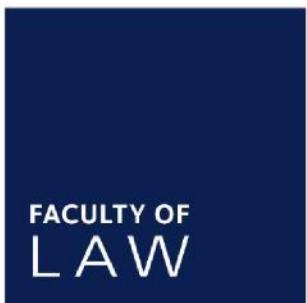


# A Preliminary Human Rights Assessment of Legislative and Regulatory Responses to the COVID-19 Pandemic across 11 Jurisdictions

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# **CONTENTS AND CONTRIBUTORS**

## **1. INTRODUCTION**

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## **2. AUSTRALIA**

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# INTRODUCTION

*Dr. Liora Lazarus*

The Covid 19 pandemic has struck at a precarious time of democratic backsliding and growing illiberalism.<sup>1</sup> The clear risk is that illiberal populist attacks on human rights, the rule of law, and constitutional democratic values may intensify. What the lessons of the post 9/11 era demonstrate, is that these threats are evident both in legal and constitutional frameworks and in political and constitutional culture.<sup>2</sup> Compounded by a global rise in autocratic populism, in which the foundations of human rights and liberal democracy are increasingly questioned, the Covid 19 emergency measures risk becoming a foundation for greater consolidation of executive power. Indeed, the Hungarian example,<sup>3</sup> and recent US constitutional arguments,<sup>4</sup> suggest that Covid 19 is a site in which executive overreach may be justified for objectives well beyond the protection of public health.

It is in this environment that exceptional measures designed to combat the spread of Covid 19 need to be continually evaluated. What we have learned from the excesses of emergency measures immediately post 9/11 is that legal frameworks considered to be exceptional at the time, can quickly become normalised in environments of fear and the political exploitation of fear.<sup>5</sup> Keeping Covid 19 measures firmly in the ‘exceptional category’ within our political culture and imagination is thus imperative. They must, in Wagner’s words, be ‘impermanent’.<sup>6</sup> Moreover, ongoing democratic and judicial scrutiny of rights limitations consequent on the introduction of these measures is crucial. The nature of these rights limitations need to be constantly evaluated within their public health context, and always tested against formal principles of legality, and substantive principles of proportionality.<sup>7</sup> The formal legality principle requires at the very least that laws promulgated meet the ‘quality of law’ test which also insists on high levels of specificity with respect to enforcement powers. The substantive proportionality element, requiring clear necessity of any measure, is inevitably contextual and case specific. The political rhetoric of broad-brush balancing overlooks the unequal burdens

<sup>1</sup> T Ginsburg and A Huq, *How to Save a Constitutional Democracy*, (Chicago University Press, 2018); S Gardbaum, ‘The Counter-Playbook: Resisting the Populist Assault on Separation of Powers’ (forthcoming); K L Scheppelle, ‘Autocratic Legalism’ 85 *University of Chicago Law Review* 2018.

<sup>2</sup> L Lazarus and B Goold, *Security and Human Rights* (Hart Publishing 2019).

<sup>3</sup> Hungary’s *Act on Protecting Against the Coronavirus* introduces a range of executive powers, downgrades democratic and electoral safeguards and has shut down the ordinary courts. K Kovacs, ‘[Hungary’s Orbanistan: A Complete Arsenal of Emergency Powers](#)’, *Verfassungsblog*, 6 April 2020; Y Serhan, ‘[The EU Watches as Hungary Kills Democracy](#)’ *The Atlantic* 2 April 2020..

<sup>4</sup> A Vermeule, ‘[Beyond Originalism](#)’ *The Atlantic* 31 March 2020; see important counter argument from D Dyzenhaus, ‘[Schmitt in the USA](#)’ *Verfassungsblog* 2 April 2020; J Chappel, ‘[Nudging Towards Theocracy: Adrian Vermeule’s War on Liberalism](#)’ *Dissent* Spring 2020.

<sup>5</sup> G Agamben, *State of Exception* (University of Chicago Press 2005); D Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* (Cambridge University Press 2006); ‘Emergency, Liberalism and the State (2011) 9 *Perspectives on Politics* 69; A Greene, *Permanent States of Emergency and the Rule of Law: Constitutions in an Age of Crisis* (Hart Publishing 2018).

<sup>6</sup> A Wagner, ‘[Can we make good laws during a bad pandemic?](#)’, *Prospect* 16 April 2020.

<sup>7</sup> Council of Europe, [\*Respecting democracy, rule of law and human rights in the framework of the COVID-19 sanitary crisis: a toolkit for member States\*](#), 7 April 2020.

that particular classes of rights bearers will experience.<sup>8</sup> Individual rights are meant to produce justice in the granular circumstances of the individual case, they cannot be justifiably limited until these individual circumstances are taken into account in the proportionality analysis.

Our evaluation of Covid 19 measures also takes into account the positive obligations that States bear to protect life, access to health and health security, and the extent to which these obligations should be shaped by countervailing negative rights.<sup>9</sup> A stereoscopic view of the human rights engaged in public health emergencies is thus crucial in assessing the rights conformity of particular measures. What is essential in this evaluation, are robust, transparent and expert mechanisms of accountability which are able to evaluate the scientific justifications of both rights limitations and the requirements of positive duties. This is not only a matter of proper constitutional practice, but also a requirement flowing from the effective protection of these rights.

Striking an appropriate balance between these positive obligations and countervailing negative rights, in this rapidly evolving environment, can only be successfully achieved in an environment of democratic, judicial and scientific contestation. Existing and novel structures of parliamentary and executive oversight are thus a key part of the ongoing accountability process of emergency measures. It is also imperative that courts remain open and fully functioning in order to ensure that judicial oversight is maintained. Moreover, successful measures can also only be achieved where a political community has shared epistemic belief in scientific evidence, and where expert scientific knowledge and debate is genuinely – decisionally and institutionally - independent of political influence.<sup>10</sup>

Moreover, in the context of positive obligations, it is imperative to emphasise the least coercive means through which public health can be achieved. While under lockdown, accountable States must demonstrate that they have pursued all possible means of extending medical health capacity, funding emergency research, upscaling testing, and scrutinising alternative measures of limiting the spread of the disease. In short, exceptional limitations of human rights should only occur where there is no adequate alternative capable of delivering a similar protection of life and access to health. This assessment is also temporal, so that alternative mechanisms need to be evaluated as a way to soften restrictions under lockdown provisions over time. While extreme lockdown measures may well be justified in the initial short term, the State is required to seek out all alternative measures (such as upscaling medical health provision and testing) as the pandemic progresses. It cannot rely indefinitely on extreme measures alone.

<sup>8</sup> J Waldron, ‘Security and Liberty: The Image of Balance’ *Journal of Political Philosophy* 2003.

<sup>9</sup> N Mavronicola ‘[Positive Obligations in Crisis](#)’ *Strasbourg Observers* 7 April 2020; E Stubbin Bates, ‘[Article 2 ECHR’s Positive Obligations – How Can Human Rights Law Inform the Protection of Health Care Personnel and Vulnerable Patients in the Covid-19 Pandemic](#)’ *Opinio Juris* 1 April 2020.

<sup>10</sup> G Appleby, Horizontal accountability: the rights-protective promise and fragility of executive integrity institutions’ 23(2) *Australian Journal of Human Rights* (2017) 168. M Landler and S Castle, ‘The Secretive Group Guiding the U.K. on Coronavirus’ *The New York Times* 24 April 2020; See concerns expressed about the independence of scientific advice in interview with former Chief Scientific Advisor, Professor Sir David King, Channel 4 News, 6.52 pm, 20 April 2020 (Available at: <https://twitter.com/Channel4News/status/1252294185224372230?s=20> accessed 24 April 2020).

The following report includes analyses of a cross section of jurisdictions from the global South and North. A crucial material divide between these jurisdictions lies in medical care capacity, the material impact of containment measures, and the capacity of States to mitigate the economic impact of containment measures on citizens. Each section of the report provides detailed examination of the lockdown measures and evaluates their constitutional and human rights implications. Despite these evident differences, there are clear trends and similarities across jurisdictions which this introduction will briefly highlight.

## **I. Human Rights Guidance**

There are now a number of human rights, rule of law and democracy organisations that have distributed general guidance on how Covid-19 measures should be evaluated. The following list is exemplary.

### **a. International Organisations**

1. Office of the United Nations High Commissioner on Human Rights, [Covid-19 Guidance](#), 16 April 2020
2. ‘Office of the United Nations High Commissioner on Human Rights | Joint Statement: [Persons with Disabilities and COVID-19 by the Chair of the United Nations Committee on the Rights of Persons with Disabilities, on Behalf of the Committee on the Rights of Persons with Disabilities and the Special Envoy of the United Nations Secretary-General](#)’, April 2020
3. ‘Office of the United Nations High Commissioner on Human Rights | “[Unacceptable” – UN Expert Urges Better Protection of Older Persons Facing the Highest Risk of the COVID-19 Pandemic](#)’
4. UN Human Rights Committee, ‘[Statement on Derogations from the ICCPR in Connection with the Covid-19 Pandemic](#)’
5. World Health Organisation (WHO), ‘[Addressing Human Rights as Key to the COVID-19 Response](#)’ (2020)

### **b. Regional organisations**

1. Council of Europe, [Respecting democracy, rule of law and human rights in the framework of the COVID-19 sanitary crisis: a toolkit for member States](#), 7 April 2020
2. Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), [Statement of principles relating to the treatment of persons deprived of their liberty](#)

3. CoE Commissioner for Human Rights, '[Persons with Disabilities Must Not Be Left behind in the Response to the COVID-19 Pandemic](#)' 2 April 2020
4. Organisation of American States, Permanent Council, [\*The OAS Response to the Covid-19 Pandemic\*](#), 17 April 2020 (CP/RES 1151 (2280/20)).
5. Organisation of American States, [\*Practical Guide to Inclusive Rights-Focused Responses to COVID-19 in the Americas\*](#)
6. '[IACHR Implements Rapid and Integrated Response Coordination Unit for COVID-19 Pandemic Crisis Management](#) (SACROI COVID-19) to strengthen the IACHR's institutional capacities for protecting and defending fundamental freedoms and human rights, especially the right to health and other environmental, social, cultural, and environmental rights (ESCERs)', 28 March 2020

**c. NGOs**

1. Human Rights Watch, [\*Human Rights Dimensions of COVID-19 Response\*](#), 19 March 2020
2. International Commission of Jurists, Pollard M, '[ICJ Guidance on the Courts and COVID-19](#)' (*International Commission of Jurists*, 7 April 2020)

**d. Academic Institutions**

1. Columbia Malman School of Public Health Forced Migration & Health, Cornell Law School Migration and Human Rights Program, The New School Zolberg Institute of Migration and Mobility, *Human Mobility and Human Rights in the COVID-19 Pandemic: Principles of Protection for Migrants, Refugees, and other Displaced Persons*
2. Centre for Global Constitutionalism – [\*Covid 19 and States of Emergency\*](#), *Verfassungsblog.de*

**e. Summary**

Combined these accord with the OHCHR guidance that stresses the critical importance of Covid-19 measures being ‘proportionate to the evaluated risk, necessary and applied in a non-discriminatory way’; that the measures be used for ‘legitimate public health goals’ rather than as a mechanism to quash broader political dissent; that governments are transparent and public about the nature and duration of the emergency measures; and that emergency measures are finite and viewed as exceptional. At the same time, governments are required to be especially vigilant in protecting the rights of older persons, women, indigenous peoples, minorities, people in detention and institutions, migrants, displaced people and refugees. They are enjoined to mitigate social and economic impacts, ensure food security, water and sanitation,

protect against stigmatisation, xenophobia and racism, while also keeping the public informed and ensuring their democratic participation and rights to privacy.<sup>11</sup> None of these objectives can be met without key accountability mechanisms being in place both democratic and within the executive and administration. Indeed, in respect of the latter, the choice of departments which are empowered to lead and police these measures is telling, as is the availability of key mechanisms of oversight.

## **II. Comparative Trends**

This report does not attempt to give a human rights score card to jurisdictions relative to one another. Instead, our reporters have been asked to identify the ‘best practices’ and ‘concerns’ that they find within each jurisdiction. Their reports have been specifically designed to look at the broader constitutional and human rights context of each jurisdiction, in order to contextualise the Covid-19 measures instituted. Some reporters have noted where health policy failures, in respect of responses to scientific data, have had a bearing on human rights. But we have not sought to evaluate the ‘success’ of measures in respect of how well jurisdictions have managed to respond to the health challenges posed by Covid-19. Our concerns here are with human rights and constitutional principles, which we believe will have a bearing on the broader global culture of human rights going forward. Inevitably, the focus of each reporter varies. In Section 3 of this introduction, we provide a summary table of each jurisdiction’s best practices and concerns. In this section, we attempt to draw together some themes that we view as more general challenges going forward.

### **a. Democratic accountability**

Within the jurisdictions covered in this report, we note a concerning trend as regards democratic scrutiny of Covid-19 measures. In many cases, normal Parliamentary activity has either been suspended on emergency grounds or it is limited for health reasons, resulting in a worrying shift in the practice of democratic debate and scrutiny. In Zimbabwe, Parliament has been suspended for a fixed period, and in Australia normal sittings of Parliament have been suspended at both a Federal and State level. In Germany, despite the active role of the Bundestag, the role of the second house (*Bundesrat*) has been downgraded and principles of federalism have been tested. In South Africa, Parliament initially imposed self-constraints on its normal processes of democratic scrutiny of Covid-19 related measures, though it has recently become more active. In the United Kingdom, many exceptional measures have been passed by statutory instrument, with limited Parliamentary scrutiny. In Hong Kong, the Emergency Regulations Ordinance, which trumps all other laws, has granted the passing of emergency regulations to the executive alone without requirements for periodic democratic review.

However, other jurisdictions have remained more consistent in their fidelity to democratic safeguards (if often virtually). In Italy, Singapore, and New Zealand Parliament remains and

<sup>11</sup> Office of the United Nations High Commissioner on Human Rights, [Covid-19 Guidance](#), 16 April 2020

engaged in the passing of exceptional measures. Novel democratic structures have also been developed. In New Zealand, an Epidemic Response Committee has been set up to scrutinise the government's action in lieu of Parliament's normal accountability mechanisms, and it is conducted virtually on public broadcast. Other novel virtual democratic mechanisms have been developed in various Parliaments that remain open. Moreover, in Australia where voting is compulsory and which currently allows any citizen to cast their votes by post, is actively considering conducting elections entirely through the post.

It is becoming clear that Covid-19 restrictions will be in place for a considerable period of time, even where these are moderated in light of emerging data. It is therefore imperative that democratic scrutiny adapts to this new health environment while staying robust. Calls for special and novel democratic scrutiny measures, such as the recent call by the UK Lords Liason Committee for a Covid-19 Committee,<sup>12</sup> are increasing and should be heard. It is imperative that executive accountability to Parliament and the electorate at large is bolstered in this extreme time.

### **b. Legal accountability**

Legal accountability is essential to the rule of law compliance of exceptional measures in a liberal constitutional framework. It is therefore imperative that courts remain, as far as possible, open for business. In Germany, courts remain open with practical adjustments for social distancing in courtrooms and with judges working from home. In India, South Africa, New Zealand and Russia courts remain open for urgent or salient matters that impact on personal liberty and personal safety and wellbeing, or for proceedings that are time-critical. In the United Kingdom, remote hearings are being held in the civil courts, but jury trials are suspended in the Crown Court. It is therefore with concern that we note the suspension of court and tribunal hearings in Italy and Hong Kong (where questions have also been raised about judicial independence). There have also been new time limitations introduced on tort claims in Hong Kong relating to acts or omissions of Government actors. It goes without saying that all human rights are implicated where there is no judicial forum in which to receive a fair hearing and an effective remedy.

Nevertheless, while courts remain open (in sometimes attenuated forms) in the majority of jurisdictions covered in the report, there are issues around the scope of executive powers granted within Covid-19 legislative measures and decrees. The principle of legality requires that discretionary powers are tightly specified and capable of being subjected to rigorous judicial review. This is inherent in the prohibition on arbitrary government, and a violation of the quality of law requirement embedded in the human rights principle of legality. We note with concern the jurisdictions in this report that have vague empowering provisions, including New Zealand (where unwritten executive orders have been relied upon), Germany (in respect of broadened federal powers) and Zimbabwe (where there is vagueness in regulations). Alongside broad discretionary powers we note that South African legislation provides for a

<sup>12</sup> House of Lords Liason Committee, [A Covid-19 Committee](#), HL Paper 56.

broad indemnification of executive action undertaken in response to the pandemic, which in turn undermines the principle of an effective remedy and judicial accountability. Finally, in Germany, our reporter argues that Courts are showing signs of undue deference to executive actions taken under lockdown powers.

All of these examples reinforce the need for rule of law vigilance as regards exceptional measures and the breadth of the powers they afford. This is imperative given the likely long-term duration of these powers, and the potential for this longer term to reshape our legal practices, cultures and traditions.

### **c. Intra-executive accountability, independence and transparency**

In a fast-moving policy environment such as the Covid-19 pandemic, the need for intra-executive accountability mechanisms are needed to enhance broader democratic accountability. We note that South Africa has appointed a ‘Covid-19 judge’ that operates within the executive structure responsible for the implementation of data collection, and alongside the ordinary jurisdiction of the courts. The judge must oversee the collection of personal data in relation to contact tracing, and make recommendations with respect to the amendment or enforcement of the relevant regulations. These kinds of novel intra-executive mechanisms are vital elements of a robust accountability framework and crucial to the refining of potentially overbroad policy making powers. The Covid-19 judge is one example of best practice in South Africa, however there are rising concerns about the broad powers afforded to the South African National Command Council which appears to sidestep normal constitutional accountability frameworks. We also note in Singapore, that there is no clear oversight over the Multi-Ministry Task Force on Covid-19 which has been set up within the executive structure to coordinate the response of various ministries to Covid-19. Moreover, in Hong Kong and Zimbabwe, the reporters have raised concerns about the absence of any serious governmental oversight body. Indeed, in Zimbabwe, anticipating problems given the existing democratic deficit, the Anti-Corruption Commission alerted relevant ministries to put in place transparency mechanisms to ensure the proper distribution of donations received. There are also questions raised regarding New Zealand’s Epidemic Response Committee which does not have the full powers needed to scrutinize urgent government regulations.

An essential ingredient of any administrative accountability body is their independence from the executive structure that they are tasked with overseeing. This is no less the case for advice bodies, particularly those with the responsibility for health policy feeding in to the shape of regulations. It is notable that the independence of the United Kingdom’s Scientific Advisory Group (SAGE) has been questioned (a concern exacerbated by the lack of transparency on the membership or processes of this group since the lockdown began.) Indeed, the UK reporter has raised a number of concerns about transparency in respect of public health processes generally.

#### **d. Emergencies, duration and derogations**

As noted earlier, the impermanence of extraordinary measures, and the frequency of scheduled democratic reviews, is an essential element of a human rights regarding framework for the conduct of health emergencies. The temporal framing and review structure of Covid-19 measures vary across jurisdictions included in this report. In Italy, Singapore, the United Kingdom, Australia, New Zealand and Zimbabwe, emergency measures are for the most part subject to temporal restrictions and timed parliamentary review. In Germany, sunset clauses are entrenched under the federally applicable Infectious Disease Prevention Act, but courts have had to step in to require sunset provisions and regular democratic review of the delegated legislation of particular Länder. In the United Kingdom, the Coronavirus Act is valid for 6 months, but can be renewed by Parliament.

In other jurisdictions, time limits and extensions are less susceptible to parliamentary review. In South Africa, the Disaster Management Act specifies that the state of disaster lapses three months after it has been declared and can then be extended each month thereafter by the executive. In Russia, there is no sunset clause in the enabling legislation, though the executive decrees specify time limits. Extensions of these decrees, which are subject to judicial review, are done by consultation between the regions and the central executive without further democratic review. Hong Kong does not have requirements for periodic review despite the sunset clauses in place for delegated regulations, this coupled with the significant powers afforded to the executive has been viewed as a source of criticism.

Interestingly, reporters deviate on whether states of emergency ought to be declared. For a number of jurisdictions, the reporters have selected as ‘best practice’ the fact that States have stopped short of declaring states of emergency where they would arguably be constitutionally permitted to do so. This has been the case in South Africa and India. In Germany, the Constitution only permits states of emergency in times of war. Consequently, the language of a ‘pandemic state of emergency’ is a metaphorical construction of the German Infectious Disease Prevention Act, and fundamental rights cannot be limited beyond ordinary constitutional standards.

The framework for derogations under jurisdictions governed by the European Convention on Human Rights, the United Kingdom, Germany and Italy, has also not been deployed. Some commentators have questioned why this device has not been pursued given the extent of the scale of limitations on specific convention rights.<sup>13</sup> Indeed, the report on the UK highlights this as a point of concern, reflecting a broader debate on this issue within that jurisdiction. Nevertheless, the report on Italy views the limitations currently in place as compatible with specific rights limitations grounds under the Convention (and the ICCPR), while in Germany no derogations have been issued from the ECHR or other international treaties.

<sup>13</sup> A Green, [States should declare a State of Emergency using Article 15 ECHR to confront the Coronavirus Pandemic](#)’ *Strasbourg Observers*, 1 April 2020.

In this context, the risk arises that ordinary limitation mechanisms for human and constitutional rights may become elasticated through this process, weakening rights safeguards in normal conditions. The advantage of declaring derogations (which are themselves subject to particular strict necessity requirements) would be to draw a clear line between limitations under health emergency conditions, and the limitations that apply in normal conditions. Nevertheless, the risk of declaring emergencies is that they give greater scope to States to limit fundamental rights and potentially place a lower justificatory burden upon the executive.

#### **e. Criminalisation, proportionality and excessive limitations of rights**

A number of jurisdictions have introduced novel crimes and penalties in an attempt to enforce the lockdown regulations and provisions designed to limit the pace of Covid-19 spread. The definition of these offences and the gravity of their associated penalties has been a cause of concern for a number of our reporters. In Singapore, the overuse and proportionality of criminal sanctions has been highlighted. In Russia, South Africa, and Zimbabwe the criminalisation of fake news has been used (to different degrees) to silence certain criticisms of government and media efforts to hold government accountable. Certainly, in Zimbabwe, the breadth of the offences on misinformation, and the use of disproportionate criminal penalties, are lend themselves to arbitrariness. Moreover, in Russia, the Parliament has toughened administrative liability for non-compliance with the lockdown measures, and the reporter has voiced concerns about the legality of the fines enforced for the breach of self-isolation requirements at the regional level. The mark of a human rights compliant system is the principle of *ultima ratio* rendering the use of the criminal law as the last resort mechanism. Consequently, Governments need to resist overuse of the criminal law and penal sanctions to enforce compliance with health enhancing measures.

Alongside the proportionality of criminal law penalties, there are also widespread concerns about excessive restrictions of basic rights, such as freedom of movement. The excessive restrictions in India, which include a prohibition on essential services such as transport for key workers, has been viewed as violating the necessity requirement. Questions have also been raised on the necessity of restrictions on exercise, and the need for a night time curfew, in South Africa. Excess in the use of criminal law or overly restrictive lockdown procedures are only exacerbated by heavy-handed policing, sometimes in terms of overuse of petty offences, a matter we return to at the end of this section.

#### **f. Privacy and other rights**

Many reporters voice concerns about the threats to privacy rights posed by proposed surveillance and tracking and tracing technology. In Australia, the development of drones and the use of mobile phone data to monitor compliance with social distancing has potential to infringe not only the right to privacy, but the right to freedom of expression and the right to peaceful assembly. In New Zealand, the surveillance by citizens of one another has been viewed as a privacy concern. In Hong Kong, the fact that personal data relating to identity, or

the location of the data subject, may be disclosed to a third party without consent and potentially used for unintended purposes has been highlighted as a serious concern. In Russia, the use of cyber surveillance tools to enforce compliance with mandatory lockdowns coupled with the lack of transparent institutional safeguards is worrying. In Singapore, the lack of accountability for the state-run TraceTogether app, and the storage and deletion of data is highlighted. In South Africa, the sweeping and non-consensual collection of individual's location data from cellular service providers is said to be potentially unconstitutional, notwithstanding the presence of institutional safeguards such as the Covid 19 judge.

There is little question that the protection of privacy and data rights interplay heavily with the capacity to realise a range of other rights, and it would be a mistake to isolate privacy from the general scheme of rights protections. As is commonly the case with the protection of these rights, the structures of oversight and the norms applying to the use of data is extremely important. It is also crucial that the data collected in the pursuit of health must be restricted for that particular use and remain in the hands of government departments tasked with protecting health, rather than being used by police or military for broader political purposes. This is without question one of the largest risks of the next phase of the pandemic response, as jurisdictions seek to restart the economy while containing the spread of Covid-19 through track and trace technology.

#### **g. Failure to protect socio-economic rights and discrimination**

The Covid-19 measures clearly pursue the rights to life, health and access to health care. But the scale of the lockdowns have resulted in unprecedented economic restrictions spawning widespread unemployment and consequent poverty. The threat to core socio-economic rights has thus been highlighted in jurisdictions where the economic compensation structures are inadequate. In India, there is a lack of satisfactory engagement with rights to food, shelter, livelihood and security under Article 21 of the Constitution, leaving millions in dire circumstances. All of these have a knock-on effect on the right to health itself. The South African and Zimbabwean cases show similar destitution, and it is striking to see the reporter on the United Kingdom highlighting concerns in respect of the right to food.

There is no question that the impact on socio-economic rights is unequal, and that particular categories of rights bearers are far more drastically affected by the lockdowns than others. The reporters on Australia, Singapore, India and Italy have all highlighted the unequal impact of lockdowns on women, migrants, asylum seekers and prisoners, signaling that these are vulnerable groups in all jurisdictions which have not instituted compensatory measures. In Australia, the unequal impact of the virus on the health rights of indigenous Australians has been highlighted. In South Africa, one of the most unequal societies in the world, our reporter has emphasised the unequal burdens imposed by the lockdown between the wealthy and the poor. In the United Kingdom, the reporter has highlighted the particular impact on disability right and the rights of older people. In Italy, the reporter has raised grave concerns about domestic violence against women, and this is a concern mirrored in a number of other jurisdictions.

All of these examples indicate a broader set of human rights concerns regarding discrimination and inequality, and a need for States to engage far more actively with countervailing measures to ameliorate the extent of rights limitations, thereby ensuring that these do not become rights violations. We note that in Singapore specific measures have been adopted to ensure prisoners' health in relation to Covid-19, while a variety of jurisdictions have introduced domestic violence support. These are just some examples of the types of countervailing measures that are needed to avoid gross human rights abuses.

#### **h. Enforcement powers and practice**

Even the best legal frameworks that have been put in place will be undermined by excessive policing. General reliance on broad regulatory discretion in the Covid-19 context has only exacerbated this problem. The most alarming trend, and the source of the greatest human rights concerns, rests in the way in which Covid-19 measures have been enforced by police and military in the jurisdictions covered. In India, our reporter speaks of human rights overreach through implementation, with an excessive use of force being used by police and insufficient inbuilt mechanisms of police oversight. In Hong Kong, the report notes that police appear to be taking advantage of new regulations for political ends and exercising excess force. In South Africa, there are widespread reports of excessive enforcement of the lockdown and other measures by the police and armed forces (which has been deployed extensively in the enforcement context). In the UK, the co-existence of non-binding advice and legislation/regulations have arguably led to the overuse of discretionary powers by police officers. In Zimbabwe there are clear abuses of power by security forces in implementing the lockdown orders. These are just a few examples of a growing trend globally of an overuse of policing and security powers, indicating the urgent necessity of implementing training in human rights and sensitive policing, as well as requiring adequate resourcing of policing structures.

### **III. Summary Evaluations**

As is evident from the tables below, the detailed jurisdictional chapters in this report are not symmetrical, and reporters have emphasised varying aspects of their particular jurisdictions.<sup>14</sup> The tables below are replicated at the end of each chapter but are compiled here to give the readers an overview of issues. The previous section has sought to put these into a thematic structure, but the tables below will provide readers with a quick reference of specific issues.

<sup>14</sup> Our sample of jurisdictions does not attempt to be fully comprehensive, and we aware that there is no jurisdiction included from Latin America and the OAS. For further information on these see: : [‘OAS Launches Practical Guide to Inclusive Rights-Focused Responses to COVID-19 in the Americas’](#), 7 April 2020; Piovesan and Antoniazzi, [‘COVID-19 and the Need for a Holistic and Integral Approach to Human Rights Protection: On Latin America and the Inverted Principle of Interdependence and Indivisibility of Human Rights’](#), Verfassungsblog, 25 April 2020; Antoniazzi and Steiniger, [‘How to Protect Human Rights in Times of Corona? Lessons from the Inter-American Human Rights System’](#), EJIL: Talk!, 1 May 2020.

Inevitably, these tables do not convey the depth of each chapter, and we recommend reading each in more detail to explore the issues highlighted in this introductory overview.

### a. Australia

Best Practices
<ul style="list-style-type: none"><li>• Rather than cancelling or postponing elections, Australia (which already allows postal votes) is considering conducting entire elections by way of post</li><li>• Border closures are temporary, subject to ongoing review, apply equally to all Australians and contain appropriate exceptions for key workers</li><li>• The Australian Government has announced an additional AUD\$150 million to support Australians experiencing domestic, family and sexual violence due to the fallout from coronavirus, which includes counselling services, support programs and a new public communication campaign</li><li>• Australia's leaders have condemned racism against Australians of Chinese and Asian ethnicity and called upon the public to speak out against racism</li></ul>
Concerns
<ul style="list-style-type: none"><li>• The suspension of Parliament and the concentration of power in the executive have the potential to undermine democratic deliberation at a time where more accountability is required, not less</li><li>• Indigenous Australians appear both more likely to contract coronavirus and more likely to suffer severe symptoms once infected, but little has been done to address their specific needs</li><li>• Keeping asylum seekers in crowded detention centres rather than authorising their release into the community might amount to inhuman or degrading treatment which may ultimately be considered to be a crime against humanity</li><li>• The development of drones and the use of mobile phone data to monitor compliance with social distancing orders has the potential to infringe a number of rights, including the right to privacy, the right to freedom of expression and the right to peaceful assembly</li></ul>

### b. Germany

Best Practices
<ul style="list-style-type: none"><li>• Sunset clauses are provided for measures under the federal Infectious Disease Prevention Act (IDPA), and the corresponding powers of the federal government are available only if a 'pandemic state of emergency', has been proclaimed by the Bundestag (Federal Parliament)</li><li>• A politically coordinated national strategy is legally specified and implemented by the Länder and local authorities, permitting some regional variation</li><li>• Courts remain open with adjustments for social distancing in courtrooms and judges working from home</li><li>• Courts conduct limited review of lockdown measures based on harm assessment in preliminary rulings, subject however to full hearings at a later stage</li></ul>

- Courts have overturned some blanket bans, and required sunset clauses as well as regular political review of lockdown measures imposed by the Länder (German states) through delegated legislation

#### **Concerns**

- Federal powers to enforce some provisions of IDPA conflict with the general Länder responsibility for the implementation of federal law under the constitution (Article 83 Basic Law)
- Provisions of IDPA that grant the Federal Minister of Health broad powers to provide exemptions from statutory requirements without oversight from Bundesrat (Representative body of Länder) conflict with the legal status of delegated legislation and amendment requirements for statutes (Article 80 Basic Law)
- There is a risk, but as yet only sporadic evidence, that courts could be overly deferential to the government lockdown measures in preliminary rulings

### **c. Hong Kong**

#### **Best Practices**

- Sunset/expiry clauses for delegated regulation clearly set out
- Compensation may be available if property is requisitioned by the Government, or where any article is damaged, destroyed, seized, surrendered to the Government in connection with Covid-19
- Citizens may claim in tort against the Government for any act or omission (however, this is also concern because the Prevention and Control of Disease Ordinance (Cap. 599) requires that claims of this kind must be made within 6 months of the act or omission, whereas normal limitation period for tort claims is 6 years)

#### **Concerns**

- The Emergency Regulations Ordinance grants the passing of emergency regulations to the executive alone, it trumps all other laws, and there is no requirement for periodic review leading to an executive-centric response
- No oversight mechanisms by Parliament or any other governmental body
- Police appear to be taking advantage of new regulations for political ends and are exercising excess force
- Personal data relating to the identity or location of the data subject may be disclosed to a third party without the consent of the data subject/individual and used for unintended purposes leading to serious privacy concerns
- All court and tribunal hearings are postponed indefinitely and the independence of the judiciary has been called into question by commentators and media

#### d. India

<b>Best Practices</b>
<ul style="list-style-type: none"><li>• Constitutional emergency has not been invoked</li><li>• Based on the quasi-federal constitutional structure, the power of individual States has been respected in taking enforceable measures in response to the pandemic</li><li>• Courts remain open for essential and urgent matters</li></ul>
<b>Concerns</b>
<ul style="list-style-type: none"><li>• The excessive use of force by police in enforcing the lockdown measures across States without adequate inbuilt mechanisms of oversight</li><li>• The excessive restrictions on freedom of movement, including a prohibition on essential services like transport for key workers, beyond what is necessary</li><li>• The lack of engagement with socio-economic rights, in particular, the rights to food, health, shelter, livelihood and security under article 21 of the Constitution, leaving millions in dire circumstances</li><li>• The lack of a public health focus in the measures, including absence of emphasis on adequate testing and treatment of Coronavirus</li></ul>

#### e. Italy

<b>Best Practices</b>
<ul style="list-style-type: none"><li>• Function of the Parliament was not suspended – democratic deliberation continued satisfactorily given the circumstances</li><li>• The emergency decree-laws adopted by the Government were introduced to the Parliament and transposed into law by it within 60 days from their adoption, in conformity with Article 77 of the Italian Constitution (i.e. the legal basis on which they were enacted)</li><li>• Measures adopted have been largely in compliance with the human rights provisions of the Italian Constitution, as well as with those of the ECHR and the ICCPR; necessity and proportionality have been largely satisfied</li><li>• Temporality of the state of emergency and the emergency measures has been observed so far.</li><li>• Gradual lifting of the measures is occurring in line with changing data</li><li>• The Italian Government has taken some considerable steps to strengthen the public healthcare system and mitigate the economic effects of the crisis and the containment measures</li></ul>
<b>Concerns</b>
<ul style="list-style-type: none"><li>• Impaired possibility for judicial review of the measures: the function of courts and the relevant legal deadlines have been suspended until 11 May, with courts remaining open only for urgent matters such as arrests or payment injunctions which can be filed electronically. It is essential that judicial activity is resumed soon to ensure compliance with ROL and HR standards during the emergency</li></ul>

- Differential impact of the measures on certain groups
  - For prisoners, social-distancing is difficult to observe due to space constraints in the overcrowded Italian prisons; same applies to migrants, refugees and asylum seekers who are still held in crowded detention centres
  - The Italian government's decision to declare Italian ports unsafe for the disembarkation of people rescued from boats flying a foreign flag due to, and for the duration of, the public health emergency is alarming
  - documented increase of domestic violence against women during the lockdown
- Concerns about current and, especially, future impact of the economic consequences of the measures on the enjoyment of socioeconomic rights

#### **f. New Zealand**

##### **Best Practices**

- An Epidemic Response committee was established to scrutinise the Government's action in lieu of the House's usual accountability mechanisms. The select committee meets by Zoom (and broadcasts these meetings publicly)
- Courts remain open for matters that '[affect] the liberty of the individual or their personal safety and wellbeing, or proceedings that are time-critical' facilitating access to justice
- Lockdown regime is built on pre-existing mechanisms and supported by a national plan consisting of a four-level alert system enabling foreseeability and transparency

##### **Concerns**

- An executive minded response consisting of unwritten executive orders can create confusion and compromise the requirement in the Bill of Rights Act 1990 that limits rights be prescribed by 'law'
- Epidemic Response committee does not have its full powers to scrutinise urgent government regulations, and it lacks any powers to recall Parliament if it thinks it necessary
- There is a risk of invasion of privacy among citizens as some people have taken to covertly supervising the activities of other citizens (reporting their neighbours, for instance)

#### **g. Russia**

##### **Best Practices**

- Courts remain open and judicial review of the cases related to the protection of constitutional rights and freedoms is regarded as urgent by the Supreme Court of Russia and the Council of Judges of Russia
- Regular online discussions between federal and regional authorities on the status of the coronavirus outbreak across the country and implemented measures with TV broadcast announcements

**Concerns**

- The federal regions of Russia may have exceeded their constitutional authority in limiting fundamental rights and freedoms while implementing lockdown measures
- Russia is using cyber surveillance tools to enforce compliance with the mandatory lockdowns in several regions and there is a concerning lack of transparency about institutional safeguards in place
- Russian Parliament has toughened administrative liability for non-compliance with the lockdown measures implemented to fight the coronavirus, but the legality of the fines enforced for the breach of self-isolation requirements at the regional level remains questionable
- Russia has enacted ‘anti-fake news’ legislation which may be used by authorities to suppress dissent at the government’s response to coronavirus

**h. Singapore****Best Practices**

- Parliamentary oversight, and executive response rooted in and subject to periodic legislative review
- Sunset clauses within executive regulations, promulgation and re-promulgation / review subject to Parliamentary scrutiny upon expiry
- Political will and extensive legislative framework, sophisticated ‘Disease Outbreak Response System Condition’ (DORSCON) framework engaging various ministries for a coordinated response
- Access to justice through the continued functioning of the court system
- Specific safeguards adopted to ensure prisoners’ health in relation to Covid-19
- Use of technology for tracking and tracing with safeguards for use of data (see concerns for a full picture of the app TraceTogether)

**Concerns**

- Proportionality of criminal sanctions and general recourse to criminal sanctions for violations of ‘circuit breaker’ measures
- Vulnerable populations (particularly migrant workers) hardest hit due to pre-existing inequalities
- Privacy concerns (such as lack of accountability) for state-run TraceTogether app data storage and deletion

**i. South Africa****Best Practices**

- The South African Constitution and the Disaster Management Act limit the executive’s regulation-making power to measures necessary for and proportionate to preventing and mitigating the pandemic
- The South African Constitution provides robust mechanisms for judicial review of the lawfulness, fairness, and reasonableness of executive action

- Courts remain open to hear salient matters, including those related to the deprivation of liberty and domestic violence
- The government has thus far refrained from declaring a state of emergency in terms of the Constitution (which would permit derogation from human rights obligations), preferring the more moderate and more rights-respecting approach of declaring a state of disaster under the Disaster Management Act
- The government has appointed a judge to oversee the collection of personal data in relation to contact tracing, and to make recommendations with respect to the amendment or enforcement of the relevant regulations
- There are strict limitations on the personal data that may be collected for the purposes of contact tracing and on the purpose and time period for which it may be collected and held
- The regulations punishing the publication of false information related to the pandemic and the government's measures to control it require the demonstration of 'intent to deceive', which will limit the reach of the prohibition
- Persons refusing testing, medical treatment, or quarantine must be brought before a court to issue a warrant, thus providing some judicial supervision of rights infringements

### **Concerns**

- Parliament initially expressed an intention to shirk its constitutional duty to hold the executive accountable during the pandemic, though it has recently become more active
- There have been reports of excessive enforcement of the lockdown and other measures by the police and other armed forces
- The National Command Council's exercise of executive authority, including the implementation of legislation and policy may be unconstitutional
- The Disaster Management Act provides for a broad (and possibly unconstitutional) indemnification of executive action undertaken in response to the pandemic
- The burdens imposed by the lockdown are unequally distributed between the wealthy and the poor
- The government has authorised sweeping, non-consensual collection of individuals' location data from cellular service providers
- The publication of certain criticisms of the government's response to the pandemic has been criminally prohibited, inhibiting media efforts to hold the government accountable
- Individuals may be forced to submit to testing, medical treatment, and quarantine

## j. United Kingdom

Best Practices
<ul style="list-style-type: none"><li>• Houses of Parliament continue debate, Parliamentary Question Time and select committees continue using public internet provision</li><li>• The Secretary of State reviews the Health Protection (Coronavirus) Regulations 2020 every three weeks</li><li>• Court hearings are ongoing, with virtual hearings for some civil cases although jury trials in the Crown Court have been suspended</li></ul>
Concerns
<ul style="list-style-type: none"><li>• Only six-monthly Parliamentary scrutiny of the powers in the Coronavirus Act 2020</li><li>• Delayed action in relation to coronavirus, and consequent avoidable loss of life potentially infringing Art. 2 ECHR</li><li>• Right to information concerns:<ul style="list-style-type: none"><li>○ true death toll</li><li>○ pandemic planning</li><li>○ government refusal to disclose the results of Operation Cygnus, which evaluated the UK's pandemic readiness</li></ul></li><li>• Arguable misinformation as to the risk profile of all sections of the population in February and March 2020, given the government's extensive rhetoric about older adults and those with 'underlying health conditions' being the (only) 'vulnerable' groups</li><li>• Failure to derogate from the European Convention on Human Rights (ECHR) and the International Covenant on Civil and Political Rights (ICCPR), despite the Health Protection (Coronavirus) Regulations, which refer to an 'emergency period'</li><li>• Failures to protect the right to life of health and social care personnel with the storage and provision of personal protective equipment (PPE)</li><li>• Rapidly changing official guidance on PPE which was tailored to supply and not scientific advice</li><li>• The co-existence of non-binding advice and legislation/Regulations, leading to the discretionary over-interpretation of the legislation by some police officers</li><li>• Alleged failures to respect and ensure the Article 2 ECHR rights of individuals in care homes and places of detention;</li><li>• Disability rights:<ul style="list-style-type: none"><li>○ Undisclosed and variable guidance on the rationing of critical care which suggests that older adults and those with significant 'frailty' would be denied critical care</li><li>○ Discriminatory practice by some general practitioners in imposing Do Not Attempt Cardiopulmonary Resuscitation orders on people with disabilities, including learning disabilities, and those in care homes.</li><li>○ Recurrent rhetoric on 'vulnerable groups' and 'shielding', which fails to acknowledge disabled and older adults' rights to life and health, and which</li></ul></li></ul>

<p>assumes they are recipients of services rather than individuals with full spectrum human rights.</p> <ul style="list-style-type: none"> <li>• Concerns about the right to food, including for the children of people with no recourse to public funds.</li> </ul>
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## k. Zimbabwe

<b>Best Practices</b>
<ul style="list-style-type: none"> <li>• Sunset clauses within executive regulations, subjecting them to re-promulgation upon expiry.</li> <li>• Functioning and reasonably independent court system as the only accountability mechanism available to the public (with the caveat that concerns have been expressed in the past regarding the independence of Zimbabwe's judiciary especially in the context of challenges to elections).</li> </ul>
<b>Concerns</b>
<ul style="list-style-type: none"> <li>• Pre-existing economic and humanitarian crises, democratic deficit, partisan media, corruption, high levels of unemployment and poverty, dependence on informal trade, police abuse of power (around elections particularly) and routine criminal prosecutions create an unstable environment for the government to respond to Covid-19.</li> <li>• Executive-minded response, with courts as the sole accountability mechanism.</li> <li>• Suspension of Parliament until 05 May 2020 leading to lack of legislative oversight.</li> <li>• Weakened public health system with lack of sufficient PPE as well as medical equipment.</li> <li>• Abuse of power by security forces in implementing the Lockdown Order.</li> <li>• Lockdown Order provision regarding publication of misinformation is overbroad and lends itself to arbitrariness.</li> <li>• Lockdown Order imposes disproportionate criminal penalties.</li> <li>• Threats to socio economic rights such as food, water, housing emerging from the Lockdown Order.</li> </ul>

# AUSTRALIA

*Dr Lionel Nichols*

## I. Constitutional Framework

As the only liberal democracy without a constitutionally-entrenched charter of rights or Human Rights Act, Australia's human rights protections are limited to the small number of rights provided for in the Constitution,<sup>15</sup> federal legislation<sup>16</sup> and rights recognised at common law. Australia has, however, ratified the seven major international human rights treaties<sup>17</sup> and so has obligations under international law to respect and promote the human rights contained therein.

One must therefore look to a variety of sources in determining the extent of human rights protections in Australia. The first is the Australian Constitution itself, which came into force in 1901 and explicitly recognises five rights.<sup>18</sup> Secondly, legislation exists at both the federal and the state & territory level which protects certain rights, such as freedom from discrimination.<sup>19</sup> Finally, the common law recognises and protects a number of rights, including those concerning due process, deprivation of liberty and freedom of speech.<sup>20</sup>

A number of fundamental rights, however, such as the right to life, the right to health, the right to education, children's rights and indigenous rights, are not explicitly protected by any of these sources. For these, one must have regard to Australia's obligations under international law. Australia has ratified the seven major international human rights treaties<sup>21</sup> and so is obliged to respect and promote the human rights contained therein. It is these international law obligations that are most relevant to Australia's response to the COVID-19 pandemic.

<sup>15</sup> The right to vote (Section 41), protection against acquisition of property on unjust terms (Section 51(xxxi)) the right to a trial by jury (Section 80), freedom of religion (Section 116) and prohibition of discrimination on the basis of residency (Section 117).

<sup>16</sup> Racial Discrimination Act 1975, Discrimination Act 1984, Disability Discrimination Act 1992, Age Discrimination Act 1996.

<sup>17</sup> International Covenant on Civil and Political Rights (ICCPR), International Covenant on Economic, Social and Cultural Rights (ICESCR), International Covenant on the Elimination of Racial Discrimination (ICERD), Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), Convention on the Rights of the Child (CRC), Convention on the Rights of People with Disabilities (CRPD).

<sup>18</sup> The right to vote (Section 41), protection against acquisition of property on unjust terms (Section 51(xxxi)) the right to a trial by jury (Section 80), freedom of religion (Section 116) and prohibition of discrimination on the basis of residency (Section 117).

<sup>19</sup> Racial Discrimination Act 1975, Discrimination Act 1984, Disability Discrimination Act 1992, Age Discrimination Act 1996.

<sup>20</sup> Chief Justice RS French, "The Common Law and the Protection of Human Rights", Speech to the Anglo Australasian Lawyers Society, 4 September 2009.

<sup>21</sup> International Covenant on Civil and Political Rights (ICCPR), International Covenant on Economic, Social and Cultural Rights (ICESCR), International Covenant on the Elimination of Racial Discrimination (ICERD), Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), Convention on the Rights of the Child (CRC), Convention on the Rights of People with Disabilities (CRPD).

## **II. Context: Out of the Fire, into the Frying Pan: Australia’s Response to COVID-19**

2020 has been quite the year for Australia. Bushfires ravaged the country from January, destroying a total land area greater than the size of Cambodia and in the process taking the lives of at least 34 people and an estimated 1 billion native wildlife. The official end of the bushfire season on 31 March was supposed to offer some much-needed respite, but instead Australia was forced to immediately grapple with the most serious global pandemic in a century.

The Australian Government’s response to COVID-19, like so many other governments around the world, has been to swiftly implement a raft of unprecedented measures. National and State borders have been closed, the Federal Parliament has effectively been shut down, strict quarantine measures have been put in place and an AUD\$189 billion (US\$117 billion) economic stimulus package has been passed.

It is often said that human rights are the first casualties of a crisis,<sup>22</sup> so it becomes pertinent to ask whether the Australian Government has had sufficient regard to human rights when developing and implementing its response to COVID-19. Whilst derogations from some human rights are permissible during public emergencies, such measures must be necessary and proportionate, and remain under constant review. What human rights issues are likely to arise from the Australian Government’s response to COVID-19? And what steps must the Australian Government take to ensure that it respects the human rights of all Australian, including its Indigenous population?

## **III. The National Cabinet**

At the time of writing, Australia is no longer governed by a Federal Government alongside eight State and Territory Governments, but rather by a “National Cabinet”, comprising the Prime Minister and all State and Territory Premiers and Chief Ministers. Meanwhile, each of these Parliaments has been shut down, with sittings not expected to resume until August. This measure is primarily a matter of Australian constitutional law, such as the division of powers between state and federal governments. It does, however, also raise human rights considerations, in particular the “right to democracy” enshrined in Article 25 of the ICCPR.

The threats posed by COVID-19 demands that leaders make numerous critical and time-sensitive decisions. This presents a challenge to any democracy because the time afforded to engage in public debates, consider dissenting voices and hold decision-makers accountable is necessarily limited. This might be exacerbated in federal nations such as Australia in which there is a division of powers between federal and regional governments, which invariably features stand-offs and compromises between parties on both sides of politics.

<sup>22</sup> Emilie M. Hafner-Burton et al., “Emergency and Escape: Explaining Derogations from Human Rights Treaties” (2011) 65 *International Organization* 673 at 674.

The Australian Prime Minister, Scott Morrison, who was heavily criticised domestically for his handling of the bushfire crisis, has adopted a rather different response to COVID-19 by seeking to include his State and Territory counterparts in decision-making through the establishment of the “National Cabinet”. This body, which has no basis in Australian constitutional law, meets several times per week to consider the latest modelling, research and scientific advice and implement decisions.

The creation of the “National Cabinet” has coincided with the decision to suspend Parliament. This move is unprecedented in Australia, whose federal parliament has sat consistently since its establishment in 1901, including through two World Wars, the Great Depression and the Spanish influenza pandemic. Many have criticised the suspension of Parliament, arguing that at this crucial time, Australia needs *more* scrutiny and accountability, not less.<sup>23</sup> Others have suggested that this measure is appropriate in the circumstances and that the legislature will continue to hold the executive to account through parliamentary committees, which might actually be more effective than Parliament since they generally work on a bipartisan basis, and have the power to subpoena documents and compel witnesses to appear.<sup>24</sup> A virtual sitting of the Federal Parliament may be necessary to pass emergency legislation which, it has been suggested, would not be unconstitutional.<sup>25</sup> Whatever model is adopted, it is crucial that all federal Bills and other legislative instruments continue to be scrutinised for their human rights implications, as required under Australian law.<sup>26</sup>

The creation of the National Cabinet and the suspension of Parliament also raises important human rights considerations. Under international human rights law, every citizen has the right to take part in the conduct of public affairs, directly or through freely chosen representatives.<sup>27</sup> The suspension of Parliament encroaches upon this right because it means that elected members are prevented from representing their constituents. On the rare occasions on which the Federal Parliament has sat during the coronavirus crisis, measures have been taken which might also be said to infringe political rights of Australian citizens. To respect and implement social distancing rules within the parliamentary chamber, Australia’s two major parties agreed to “pair” 30 MPs each, with the effect that 60 MPs did not attend Parliament. In this way, Parliament continued to be quorate and the Government was able to maintain its narrow majority. The effect of this, however, was that around 6 million voters did not have their elected representative in Parliament. Moreover, only around 20 percent of those who did attend were women, which exacerbated a pre-existing concern over gender equality within the chamber.<sup>28</sup>

<sup>23</sup> Kim Carr, “Parliament sat during world war two and Spanish flu, Morrison should not be cancelling it for coronavirus”, *The Guardian*, 3 April 2020; Stephen Mills, ““Where no counsel is, the people fall”: why parliaments should keep functioning during the coronavirus crisis”, *The Conversation*, 27 March 2020.

<sup>24</sup> Anne Twomey, “A virtual Australian parliament is possible – and may be needed – during the coronavirus pandemic”, *The Conversation*, 25 March 2020.

<sup>25</sup> *Ibid.*

<sup>26</sup> Human Rights (Parliamentary Scrutiny) Act 2011 (Cth).

<sup>27</sup> International Covenant on Civil and Political Rights, Article 25(a).

<sup>28</sup> Stephen Mills, ““Where no counsel is, the people fall”: why parliaments should keep functioning during the coronavirus crisis”, *The Conversation*, 27 March 2020.

The “right to democracy”, as enshrined in Article 25 of the ICCPR, contains the caveat that the right must be provided “without unreasonable restrictions”. Whilst it might be argued that Australia’s response represents a reasonable restriction on the right to participate in public affairs in light of the urgent and extreme challenges presented by the coronavirus, it is crucial that this remains under constant review and that these measures go no further than absolutely necessary.

#### **IV. Elections and Compulsory Voting**

The holding of periodic elections is an essential feature of Article 25 of the ICCPR. This raises the question of whether it is legitimate for governments to postpone or cancel elections due to the public health risks associated with coronavirus.

This issue is made more acute in Australia, which is one of the few countries in the world that makes voting at elections compulsory. All Australians aged 18 or over are required to vote in Federal, State and Territory elections (as well as most local government elections). The overwhelming majority of Australians cherish the regular exercise of their democratic right at the polling booth (typically accompanied by a traditional Australian barbecue and a “democracy sausage”), but the 5 percent of Australians who fail to do so risk being fined and possibly being required to attend a court hearing.

By 28 March 2020, Queensland had taken the decision to suspend its parliament and close its borders, but nevertheless determined it would proceed with local government elections scheduled that day for the State’s 77 councils. The Queensland Electoral Commission declared the elections to be an “essential service” because they provided for continuity of democratic representation for Queenslanders.<sup>29</sup> Although around 570,000 people applied for postal votes before the deadline, large numbers did not receive their postal votes in time, meaning that they were required by law to attend a polling booth and cast their vote.<sup>30</sup> The State’s leading newspaper that morning carried a front page warning that if any of the 1 million voters still required to cast their vote failed to do so, they risked being hit with a AUD\$133 fine.<sup>31</sup> The Queensland Electoral Commission, meanwhile, assured voters that adequate social distancing measures would be put in place at polling stations. Queenslanders thereby found themselves between the proverbial rock and a hard place: stay at home and risk being fined or attend a polling station and risk their (and their family’s) health.

<sup>29</sup> Electoral Commission Queensland, 2020 Local Government Elections – COVID-19 Protection Measures, March 2020.

<sup>30</sup> Ben Smee, “Queensland elections: coronavirus poses ‘lethal risk’ to voters, experts say”, *The Guardian*, 26 March 2020.

<sup>31</sup> Jack McKay, “If you don’t vote, expect \$133 fine, ECQ warns”, *The Courier Mail*, 28 March 2020.

Subsequently, the Queensland Premier has confirmed that State elections, scheduled for 31 October 2020, will go ahead, although consideration is being given to this being held entirely by postal vote.<sup>32</sup>

## V. Closing the Borders

The coronavirus pandemic has also caused Australia to close its external and internal borders. Tasmania led the way on 21 March when it required all non-essential travellers arriving in Australia's island State to self-isolate for 14 days, with penalties for non-compliance including a fine of up to AUD\$16,800 or up to six months' imprisonment. Western Australia went even further on 5 April when it prevented any non-essential person from crossing the border.<sup>33</sup> It might be said that such actions are contrary to section 92 of the Australian Constitution, which provides that trade, commerce and intercourse amongst the States "shall be absolutely free". Although section 92 does not contain any explicit exceptions, it is perhaps likely that the Australian High Court would imply an appropriate exception should anyone seek to challenge the decision to close internal borders.<sup>34</sup> Any border closures would also have to comply with section 117, which prevents a State from imposing any "disability or discrimination" on residents of another State. In order to comply with this provision, Western Australia applied the border closure to all Australians, including those who are ordinarily resident in Western Australia.<sup>35</sup>

The Federal Government has taken advantage of Australia's geographic isolation by imposing significant restrictions on Australia's external borders. This began on 18 March when the Minister for Health officially declared a biosecurity emergency in the country. By doing so, the Minister for Health obtained expansive powers under the Biosecurity Act 2015 (Cth), which includes the power to prevent the movement of people within and between areas.<sup>36</sup> The Minister for Health exercised these powers by banning cruise ships from entering Australian ports and imposing an overseas travel ban on all Australians and permanent residents.<sup>37</sup>

These unprecedented measures engage Article 12 of the ICCPR, which guarantees all individuals within Australia the right to move freely within its borders, to choose his or her place of residence, and to travel abroad. Importantly, however, Article 12(3) provides for exceptional circumstances in which these rights may be restricted, including to protect public health. In order to comply with this exception, the restrictive measures must be necessary, conform with the principle of proportionality, be an appropriate means for achieving their

<sup>32</sup> Matt Wordsworth, "Coronavirus may see full postal vote for Queensland October state election, Premier says", *ABC News*, 9 April 2020.

<sup>33</sup> Government of Western Australia, "Temporary border closure to better protect Western Australians", 2 April 2020.

<sup>34</sup> *R v Smithers* [1912] HCA 96; *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1.

<sup>35</sup> Tamara Tulich, Marco Rizzi and Fiona McGaughey, "Fighting COVID 19 – Legal Powers and Risks: Australia", *Verfassungsblog*, 10 April 2020.

<sup>36</sup> Biosecurity Act 2015 (Cth), section 477(3)(b).

<sup>37</sup> Tamara Tulich, Marco Rizzi and Fiona McGaughey, "Fighting COVID 19 – Legal Powers and Risks: Australia", *Verfassungsblog*, 10 April 2020.

protective function, be the least intrusive instrument for achieving that objective, and be consistent with all other human rights.<sup>38</sup> Whilst it may be said that the restrictions on freedom of movement meet these criteria at the present time, it is essential that the restrictions be properly scrutinised and regularly reviewed in light of the rapidly evolving COVID-19 situation to ensure that the restrictions go no further than is absolutely necessary.

## **VI. Social Distancing**

Like many countries around the world, Australia has implemented strict social distancing measures. Australians are required to only leave home where it is absolutely essential to do so and to remain at least 1.5 metres away from others at all times. No more than two people can be in public together, unless they are part of the same household. Bars, restaurants, shops, galleries and playgrounds have all been closed. Weddings are limited to five people and funerals to 10 people.

Whilst the vast majority of Australians have complied with these directives, there has not been universal compliance. Images of thousands of Australians enjoying a sunny day at Sydney's world-famous Bondi Beach were beamed around the globe, prompting the National Cabinet to impose tougher restrictions and consider enforcement measures. New South Wales, for example, has granted enhanced powers to enforce these public health orders and to arrest people who breach the quarantine restrictions. Victoria, meanwhile, created a 500-strong special taskforce with the mandate to shut down social gatherings. The Australian Prime Minister has even called upon Australians to report others who are failing to comply with the directives.

Perhaps more controversially, a team at the University of South Australia has been tasked with developing a “pandemic” drone capable of remotely detecting symptoms of coronavirus. The drone is to be fitted with a specialised sensor and computer vision system allowing it to monitor temperatures, as well as heart and respiratory rates of people in public spaces.<sup>39</sup> Meanwhile, Western Australia plans to deploy drones to parks, beaches and shopping strips to enforce social distancing rules. Whilst most Australians might be comfortable with drones that monitor bushfires, deliver essential goods in remote locations or assist in search and rescue operations, civil libertarians have expressed concern over the increased prevalence of drones in Australia and their impacts on their right to privacy.

Similarly, not all Australians are comfortable with the prospect of having their mobile phones monitored to help trace and prevent the spread of infection.<sup>40</sup> Under Australian law, all mobile service providers are required to hold location information for each of their phones for at least two years. In theory, this would enable authorities to search the travel history of every Australian who tests positive to COVID-19 and contact every person who has been in close

<sup>38</sup> United Nations, Human Rights Committee, General Comment No. 27.

<sup>39</sup> University of South Australia, “UniSA working on ‘pandemic drone’ to detect coronavirus”.

<sup>40</sup> Patrick Fair, “Privacy vs pandemic: government tracking of mobile phones could be a potent weapon against COVID-19”, *The Conversation*, 27 March 2020.

proximity with the infected individual. This carries with it obvious privacy concerns, as well as issues relating to the confidentiality of medical records. It might also be that the technology, having been developed for a legitimate purpose today, might be utilised for an illegitimate purpose tomorrow. Coincidentally, the Australian Human Rights Commission has commenced a project on the interaction between human rights and technology and, as a consequence of the issues raised by the coronavirus pandemic, extended the public consultation period to incorporate views on these important issues. On the one hand, technology has the potential to drastically reduce the scale of infections during a global public health emergency such as COVID-19, whilst at the same time providing greater protections to the most vulnerable members of society. On the other hand, any increase in a government's capacity to monitor surveillance threatens to infringe important human rights such as the right to privacy, freedom of expression and freedom of association. In striking this balance, governments must ensure that (1) the surveillance measures lawful, necessary and proportionate; (2) any data collected is used only to respond to the specific public health emergency; and (3) laws and policies are implemented transparently with appropriate accountability protections and safeguards against abuse.

## VII. Indigenous Australians

Regrettably, there is reason to believe that Indigenous Australians will be disproportionately affected by the coronavirus pandemic. During the 1918 Spanish flu pandemic, Indigenous peoples accounted for 30 percent of all deaths in Queensland, despite only comprising a small fraction of the population.<sup>41</sup> Similarly, during the H1N1 pandemic in 2009, Indigenous Australians were 3.2 times more likely to end up in hospital, 4 times more likely to be placed into intensive care, and 4.5 times more likely to die as a result of the virus.<sup>42</sup>

Around 50 percent of adult Indigenous people live with a major chronic disease, more than half of Indigenous people living in remote communities live below the poverty line and around 12 percent live in overcrowded housing. When these factors are combined with the historic disadvantages of Indigenous Australians, including in terms of access to adequate healthcare, the prognosis looks alarming. Indigenous Australians appear both more likely to contract coronavirus and more likely to suffer severe symptoms once infected.

The body representing more than 140 Aboriginal community-controlled health services has called on the Federal Government to urgently assist in preparing for the pandemic, including testing, protective equipment, access to food and sanitation, and information campaigns suitable for remote communities. The Aboriginal and Torres Strait Islander Social Justice Commissioner has again urged the Federal Government to implement 14 recommendations

<sup>41</sup> Mark Brough, "Healthy Imaginations: A Social History of the Epidemiology of Aboriginal and Torres Strait Islander Health" (2001) 20(1) *Medical Anthropology: Cross-Cultural Studies in Health and Illness* 65.

<sup>42</sup> Adrian Miller and David Durrheim, "Aboriginal and Torres Strait Islander communities forgotten in new Australian National Action Plan for Human Influenza Pandemic", 20 September 2010.

designed to close the gap between Indigenous Australians and other Australians in order to improve healthcare, social and economic outcomes.<sup>43</sup>

To date, however, not enough has been done to address the plight of Indigenous Australians in tackling the virus. Nothing in the Federal Government's AUD\$17.6 billion coronavirus stimulus package was specifically targeted to remote Indigenous communities, with Aboriginal Australians having to make do with the one-off AUD\$750 payment. This has caused the Aboriginal and Torres Strait Islander Advisory Group on COVID-19 to warn that a "failure to implement an equitable response commensurate with the situation will result in significantly poorer outcomes for Aboriginal and Torres Strait Islander peoples."<sup>44</sup> Such an outcome could be contrary to Australia's obligation under Article 2(1) of the ICCPR to respect and ensure rights without discrimination, as well as numerous rights recognised in the Declaration on the Rights of Indigenous Peoples (although, it must be observed, that Australia was one of just four States to vote against this non-binding instrument).

### **VIII. Discrimination**

Australia must remain vigilant to ensure that any policies that are implemented are applied in a non-discriminatory fashion and give due regard to minority groups, particularly those who are likely to be disproportionately affected by COVID-19.

For example, women are disproportionately impacted by COVID-19. Most health care workers, social welfare workers and unpaid carers are female, thereby exposing women to greater risks of contracting coronavirus. Australia's Sex Discrimination Commissioner has therefore welcomed the Australian Government's decision to provide around one million families with free childcare during the pandemic,<sup>45</sup> thereby supporting all parents, including mothers, to return to work.<sup>46</sup> The United Nations has also observed that the imposition of extreme social distancing measures requiring families to stay at home has led to an intensification of domestic violence against women and children.<sup>47</sup> In recognition of this, the Australian Government has announced an additional AUD\$150 million to support Australians experiencing domestic, family and sexual violence due to the fallout from coronavirus, which includes counselling services, support programs and a new public communication campaign.<sup>48</sup>

Measures must also be taken to ensure that racial and ethnic minorities are not persecuted or discriminated against because of COVID-19. Around 1.2 million Australians (around 5 percent

<sup>43</sup> June Oscar AO, "Failure to close the gap in healthcare puts Aboriginal and Torres Strait Island people at increased risk", 8 April 2020.

<sup>44</sup> Australian Government Department of Health, Management Plan for Aboriginal and Torres Strait Island populations, March 2020.

<sup>45</sup> Prime Minister of Australia, "Early Childhood Education and Care Relief Package", 2 April 2020.

<sup>46</sup> Kate Jenkins, "The gendered impact of COVID-19", 8 April 2020.

<sup>47</sup> UN Women, COVID-19 and Ending Violence Against Women and Girls, available at: <https://www.unwomen.org/-/media/headquarters/attachments/sections/library/publications/2020/issue-brief-covid-19-and-ending-violence-against-women-and-girls-en.pdf> (last accessed 10 April 2020).

<sup>48</sup> Prime Minister of Australia, "\$1.1 Billion to Support More Mental Health, Medicare and Domestic Violence Services", 29 March 2020.

of the population) have Chinese ancestry and it has been reported that members of this group have been the target of xenophobia, vitriol and crime following the outbreak of the pandemic. Some have been barred from schools, others from restaurants. According to the Australian Human Rights Commission, around one in four people who lodged racial discrimination complaints in the past two months say they have been targeted due to COVID-19.<sup>49</sup> Fortunately, this is something that appears to be on the radar of Australia's leaders, with the Prime Minister, the Opposition Leader and the Chief Medical Officer condemning racial discrimination from as early as February and calling upon Australians to call out and report any racist behaviour.<sup>50</sup> These are welcome interventions, given that during the same period the US President was describing COVID-19 as the “Chinese virus”, ignoring criticism that the term is racist is likely to incite tensions with the Chinese community.<sup>51</sup>

Australia's multicultural and multilingual public broadcaster has also created an information portal about COVID-19 in 63 languages to ensure that Australians of all races and ethnicities are able to access the most up-to-date advice on coronavirus.<sup>52</sup>

Finally, Australia's Disability Discrimination Commissioner has called on the Australian Government to do more to address the challenges that the global pandemic poses to people with a disability.<sup>53</sup> Whilst some steps have been taken, such as the inclusion of sign language interpreters at key press conferences, there is still much more work to be done to ensure that Australians with disability are treated equally and in a non-discriminatory manner. Such measures are necessary in order to meet both Australia's obligations under international law - including guarantees of non-discrimination under Article 2(1) of the ICCPR and disability rights as recognised in the CRPD - as well as under domestic legislation.<sup>54</sup>

## **IX. Immigration Detainees**

Australia currently holds some 1,400 people in immigration detention facilities,<sup>55</sup> pursuant to an immigration policy that has been routinely condemned by the United Nations.<sup>56</sup> The conditions in which immigrants are detained make it virtually impossible for them to comply with the social distancing advice, meaning that COVID-19 poses a far greater risk to detainees than the general population. A letter authored by 1,200 healthcare professionals claimed that the makeshift hotels in Melbourne and Brisbane in which this population is housed represent a

<sup>49</sup> Jason Fang, Erwin Renaldi and Samuel Yang, “Australians urged to ‘show kindness’ amid reports of COVID-19 racial discrimination complaints”, *ABC News*, 3 April 2020.

<sup>50</sup> Tom Stayner, “Chief medical officer demands end to racism towards Chinese-Australians over coronavirus”, *SBS News*, 11 February 2020.

<sup>51</sup> “Trump defends calling coronavirus the ‘Chinese Virus’”, *Al Jazeera News*, 23 March 2020.

<sup>52</sup> <https://www.sbs.com.au/language/coronavirus>

<sup>53</sup> Dr Ben Gauntlett, “Pandemic requires comprehensive response for Australians with disability”, 8 April 2020.

<sup>54</sup> Disability Discrimination Act 1992.

<sup>55</sup> Department of Home Affairs, Immigration Detention and Community Statistics Summary, 29 February 2020.

<sup>56</sup> United Nations Human Rights Council, Opinions adopted by the Working Group on Arbitrary Detention at its eight-first session, 17-26 April 2018, 20 June 2018, A/HRC/WGAD/2018/20.

“very high-risk environment” for the transmission of coronavirus.<sup>57</sup> The United Nations has urged governments around the world to review the use of immigration detention and closed refugee camps with a view to reducing their populations to the lowest possible level.<sup>58</sup> The Australasian Society for Infectious Diseases<sup>59</sup> and the Australian Human Rights Commissioner<sup>60</sup> have called for those immigration detainees who do not pose a significant security or health risk to be released into the community. To date, however, this advice has been ignored by the Australian Government which is of concern given that a guard working in at least one of the detention centres has already tested positive for coronavirus.<sup>61</sup> This potentially places Australia in breach of a number of obligations under international human rights law, including the right to life and freedom from cruel, inhuman or degrading treatment. If the practice is found to be sufficiently widespread or systematic, it could even constitute a crime against humanity.

## X. Conclusion

According to the Australian Treasurer, extraordinary times call for extraordinary measures. Whilst that may be true, it is crucial that whatever extraordinary measures are imposed in response to the COVID-19 pandemic comply with human rights law. This requires that the measures be necessary, proportionate, time limited and subject to ongoing review. In the words of Professor Keane, “emergency rule gets people used to subordination. It nurtures voluntary servitude. It is the mother of despotism and ... strangely resembles the virus it claims to combat.”<sup>62</sup>

## XI. Summary Evaluation

Best Practices
<ul style="list-style-type: none"><li>• Rather than cancelling or postponing elections, Australia (which already allows postal votes) is considering conducting entire elections by way of post</li><li>• Border closures are temporary, subject to ongoing review, apply equally to all Australians and contain appropriate exceptions for key workers</li><li>• The Australian Government has announced an additional AUD\$150 million to support Australians experiencing domestic, family and sexual violence due to the fallout from coronavirus, which includes counselling services, support programs and a new public communication campaign</li></ul>

<sup>57</sup>Biana Hall, “Doctors warn of deadly coronavirus risks for refugees, guests at Melbourne hotel”, *Sydney Morning Herald*, 1 April 2020.

<sup>58</sup> United Nations Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Advice of the Subcommittee on Prevention of Torture to States Parties and National Preventative Mechanisms relating to the Coronavirus Pandemic (adopted on 25 March 2020).

<sup>59</sup> <https://www.asid.net.au/documents/item/1868>

<sup>60</sup> Edward Santow, “Ensuring human rights safeguards for everyone in Australia”, 8 April 2020.

<sup>61</sup> Ben Smee, Ben Docherty and Rebekah Holt, “Fears for refugees after guard at Brisbane immigration detention centre tests positive for coronavirus”, 19 March 2020.

<sup>62</sup> Daniel Keane, “Coronavirus, emergency laws and civil liberties: Are our rights and freedoms at risk?”, *ABC News*, 2 April 2020.

- Australia's leaders have condemned racism against Australians of Chinese and Asian ethnicity and called upon the public to speak out against racism

### **Concerns**

- The suspension of Parliament and the concentration of power in the executive have the potential to undermine democratic deliberation at a time where more accountability is required, not less
- Indigenous Australians appear both more likely to contract coronavirus and more likely to suffer severe symptoms once infected, but little has been done to address their specific needs
- Keeping asylum seekers in crowded detention centres rather than authorising their release into the community might amount to inhuman or degrading treatment which may ultimately be considered to be a crime against humanity
- The development of drones and the use of mobile phone data to monitor compliance with social distancing orders has the potential to infringe a number of rights, including the right to privacy, the right to freedom of expression and the right to peaceful assembly

# GERMANY

*Dr Stefan Theil*

The German Infectious Diseases Protection Act (Infektionsschutzgesetz – IDPA) is the primary federal statute regulating the fight against covid-19 in Germany.<sup>63</sup> The Act has been recently amended to provide the federal government with a greater role in enforcement and expanded its authority to pass delegated legislation without the consent of the Bundesrat. The Bundesrat is the representative body of the German states at the federal level whose consent is ordinarily required before any law can be enacted or amended that impacts on the state sphere of competence. These changes are perhaps understandable given the current crisis, but they raise constitutional concerns because they at times clash with provisions of the German Basic Law. This contribution provides an overview of the constitutional and IDPA framework, and highlights some initial preliminary rulings from German courts, most notably from the Constitutional Court. Finally, it assesses the constitutionality of the newfound powers of the federal executive.

## I. Fundamental rights framework

Germany is subject to international human rights obligations under the International Covenant on Civil and Political Rights and Economic, Social and Cultural Rights, the European Convention on Human Rights, and the European Social Charter, as well as the European Charter of Fundamental Rights when implementing European Union Law (Article 51 para 1 Charter). However, the extensive catalogue of fundamental rights contained in the Basic Law is generally considered broader and more significant in legal assessments, particularly where courts are reviewing lockdown measures.

Any statute must be interpreted and applied in a manner that is consistent with constitutional safeguards, most notably the fundamental rights protections of the German Basic Law (Articles 1 para 3 and 20 Basic Law). The right to life (Article 2 para 2 Basic Law) constitutes a key provision in the German response and justification of covid-19 measures, with strong connections to the fundamental commitment to human dignity.<sup>64</sup> The right to health encompasses human health in a physiological sense,<sup>65</sup> and bodily integrity,<sup>66</sup> while human well-being is protected at least to the extent that it is disrupted by physical pain.<sup>67</sup> The

<sup>63</sup> For the full text of the statute (in German), see <https://www.gesetze-im-internet.de/ifsge/>

<sup>64</sup> Federal Constitutional Court, 1 BvR 357/05, 15 February 2006, BVerfGE 115, 118 (139); Federal Labour Court, 2 AZR 638/99, 8 June 2000, BAGE 95, 78.

<sup>65</sup> Federal Constitutional Court, 1 BvR 612/72, 14 January 1981, BVerfGE 56, 54 (74).

<sup>66</sup> Federal Constitutional Court, 2 BvR 882/09, 23 March 2011, BVerfGE 128, 282 (302) [emphasizing self-determination and consent with regard to surgical procedures].

<sup>67</sup> Federal Constitutional Court, BVerfGE 56, 54 (75) [left open with respect to psychological pain].

protections are primarily directed against state actions that infringe on these rights and include positive obligations.<sup>68</sup>

The state typically discharges its positive obligations through appropriate regulations,<sup>69</sup> which must be adequate and effective.<sup>70</sup> Crucially, an unaddressed threat to life and health may be sufficient on its own to find a violation.<sup>71</sup> However, the Constitutional Court generally resists the idea that the right to life mandates any specific regulatory interventions.<sup>72</sup> Under most circumstances, the state has a wide margin of appreciation in determining appropriate regulatory actions.<sup>73</sup>

This was made clear by the Constitutional Court in the case of *Lagerung chemischer Waffen*, concerning the storage of chemical weapons on German territory in US military depots.<sup>74</sup> The applicants alleged that Germany had failed to live up to its obligations to protect their rights by permitting the storage of chemical weapons near their homes and businesses, as well as failing to ensure adequate safety standards and precautionary measures.<sup>75</sup> The Constitutional Court held that while there was a positive obligation, in principle, to safeguard the rights right to life, the state enjoyed a considerable margin of appreciation in determining the correct balance with the public interest. To the extent that the applicants demanded the removal of chemical weapons due to their (potentially) hazardous nature, they had failed to establish that this was the only means of living up to the positive obligation.<sup>76</sup> Instead, the storage of chemical weapons both ensures the military protection of Germany, while also entailing risks for individuals.<sup>77</sup> The court thus requires only that protective measures are not entirely unsuitable or inadequate.<sup>78</sup> Barring such rare cases, it is unlikely that the protection of life and health will mandate any specific public health interventions, and certainly not legitimate the negation of negative rights such as privacy and freedom of movement on their own.<sup>79</sup>

<sup>68</sup> Ibid (73); Federal Administrative Court, 4 C 995, 21 March 1996, BVerwGE 101, 1 (10); Federal Constitutional Court, 1 BvR 518/02, 4 April 2006, BVerfGE 115, 320 (346); Federal Constitutional Court, 1 BvQ 5/77, 16 October 1977, BVerfGE 46, 160 (164).

<sup>69</sup> Federal Administrative Court, 7 C 6981, 18 March 1982, BVerwGE 65, 157 (160).

<sup>70</sup> Federal Constitutional Court, 2 BvF 2/90; 2 BvF 4/90; 2 BvF 5/92, 28 May 1993, BVerfGE 88, 203 (254); Federal Constitutional Court, BVerfGE 56, 54 (78).

<sup>71</sup> Federal Constitutional Court, 2 BvR 1060/78, 19 June 1979, BVerfGE 51, 324 (346); Federal Constitutional Court, 2 BvR 1160/83; 2 BvR 1565/83; 2 BvR 1714/83, 16 December 1983, BVerfGE 66, 39 (58).

<sup>72</sup> A notable exception is the existential minimum, where Article 2 para 2 functions in conjunction with Article 1 para 1 (human dignity), see Federal Constitutional Court, 1 BvL 1/09; 1 BvL 3/09; 1 BvL 4/09, 9 February 2010, BVerfGE 125, 175 (223).

<sup>73</sup> Federal Constitutional Court, 1 BvR 1301/84, 30 November 1988, BVerfGE 79, 174 (202); Federal Constitutional Court, 1 BvR 1025/82, 1 BvL 16/831, 1 BvL 10/91, 28 January 1992, BVerfGE 85, 191 (212).

<sup>74</sup> Federal Constitutional Court, 2 BvR 624/83; 2 BvR 1080/83; 2 BvR 2029/83, 29 October 1987, BVerfGE 77, 170.

<sup>75</sup> Ibid [10] – [15].

<sup>76</sup> Ibid [112].

<sup>77</sup> Ibid [126].

<sup>78</sup> Ibid [112].

<sup>79</sup> Lockdown measures can notably impact the enjoyment of the following fundamental rights of the Basic Law: Article 2 para 1 in conjunction with Article 1 para 1 (right to informational self-determination), Article 2 (personal freedom), Article 4 (freedom of faith and conscience), Article 5 (freedom of expression), Article 8 (freedom of assembly), Article 9 (freedom of association), Article 11 (freedom of movement), and Article 12 (occupational freedom).

## **II. Infectious Diseases Protection Act**

The IDPA empowers competent authorities (generally Länder, and by extension local authorities) to adopt measures ranging from monitoring to preventative and repressive measures: these include bans on public gatherings, quarantine measures and restrictions on free movement, prohibitions on individual professional activities, and closing of public facilities such as day care centres, schools and educational facilities, care homes and vacation camps (see §§ 29 – 33 IDPA). Measures can generally be directed against infected persons, suspected cases, and those who are asymptomatic carriers, but also the general public. This is achieved through administrative acts directed at individuals, decisions of general application (*Allgemeinverfügung*) directed at an indeterminate, but discrete group of individuals (for instance the would-be audience of a rock concert) and general delegated legislation that addresses and imposes duties on the public as such (§ 32 IDPA). A general clause further permits any other measures necessary (§ 28 IDPA) but is generally thought an insufficient legal basis for measures that are significantly broader than the enumerated examples: most notably with respect to the persons covered and the impact on fundamental rights.

The initial appeal for authorities to pass measures under § 28 IDPA was that these measures could be enforced by way of a decision of general application, and hence only be legally challenged on an individual by individual basis: in other words, a potentially adverse court ruling against measures adopted under § 28 IDPA impacts only the legal validity with respect to the individual bringing the case, but leaves it intact with respect to the wider public. By contrast, legal challenges against delegated legislation adopted under § 32 IDPA affect the legal validity beyond the parties to the case. In that vein, the law expressly permits limitations of fundamental rights, notably freedom of assembly, freedom of movement, and inviolability of the home (§ 28 para 1 and § 32). Nonetheless, concerns have been raised whether the sweeping lockdown measures can be based on IDPA provisions, especially in light of their far-reaching fundamental rights implications.<sup>80</sup> So far, however, courts have generally upheld the lockdown measures imposed by the Länder and local authorities under delegated legislation.

## **III. Preliminary court decisions**

The Munich administrative court first held that § 28 IDPA cannot support a general prohibition on leaving home without a proper excuse and the social distancing rules that are now the norm across Germany.<sup>81</sup> Instead, competent authorities must enact delegated legislation under § 32

<sup>80</sup> For concerns over whether there is a sufficient legal basis for such a limitation of rights, see Carsten Bäcker, '[Corona in Karlsruhe II](#)' (*Verfassungsblog*, 8 April 2020) <<https://verfassungsblog.de/corona-in-karlsruhe-ii/>> accessed 14 April 2020; for concerns over the proportionality of some measures, see Oliver Lepsius, '[Vom Niedergang grundrechtlicher Denkkategorien in der Corona-Pandemie](#)' (*Verfassungsblog*, 6 April 2020) <<https://verfassungsblog.de/vom-niedergang-grundrechtlicher-denkkategorien-in-der-corona-pandemie/>> accessed 14 April 2020.

<sup>81</sup> Munich Administrative Court, M 26 S 201252, 24 March 2020, unpublished [20].

IDPA to achieve these outcomes. Regional administrative courts, for instance in Berlin, have generally upheld the measures adopted under delegated legislation in preliminary rulings.<sup>82</sup>

A notable counter-example comes from the Upper Administrative Court of Mecklenburg Western Pomerania, which in a preliminary ruling quashed a prohibition on touristic travel to the Baltic sea resorts for residents of the state.<sup>83</sup> The Court was not convinced that the restrictions would prevent large gatherings of people and hence failed the reasonable test of the proportionality assessment. Moreover, significant regions, including the capital city of the state was exempted from the restriction. Finally, the applicant had convincingly argued that the prohibition on out of state tourists left sufficient space for effective social distancing among residents.

Beyond regional administrative courts, the Federal Constitutional Court has also addressed some lockdown measures through requests for preliminary injunctions. A request for a preliminary injunction against delegated legislation enacted by the state of Berlin pursuant to § 32 IDPA was dismissed at the admissibility stage.<sup>84</sup> The Constitutional Court determined that the applicant had failed to exhaust the available administrative court remedies to challenge restrictions on free assembly and social distancing. The fact that the Berlin delegated legislation provides for fines and enforcement mechanisms alone was insufficient to substantiate a violation of fundamental rights, as the applicant could have sought a declaratory ruling from lower courts.<sup>85</sup>

A challenge against the delegated legislation enacted by Bavaria was admissible, but likewise rejected based on the harm assessment conventionally adopted by the Constitutional Court in preliminary rulings.<sup>86</sup> The test emphasises and evaluates the potential harm to fundamental rights if no injunction is ordered versus the harm caused if an injunction is granted pending the main proceeding. On this basis, the Constitutional Court was not convinced that the harm to the applicant's rights outweighed the risks to life and health of others.<sup>87</sup> The Court likewise rejected a separate application seeking permission to hold a protest against the lockdown in Munich.<sup>88</sup> However, in a regional twist, the Higher Bavarian Administrative Court ultimately permitted the protest to go forward, reasoning that the city of Munich made errors in the exercise of its discretionary powers.<sup>89</sup>

<sup>82</sup> Higher Administrative Court Berlin-Brandenburg, OVG 11 S 14/20, 3 April 2020, unpublished (denied injunctive relief to applicant challenging limitations on care home visitation); Higher Administrative Court Berlin-Brandenburg, OVG 11 S 20/20, 8 April 2020, unpublished (denied injunctive relief following challenge against limitations placed on professional practice of a lawyers); Higher Administrative Court Berlin-Brandenburg, OVG 11 S 2120, 8 April 2020, unpublished (confirming a time-limited prohibition on religious services and gatherings).

<sup>83</sup> Upper Administrative Court of Mecklenburg Western Pomerania, 2 KM 268/20 OVG; 2 KM 281/20 OVG, 9 April 2020, unpublished.

<sup>84</sup> Federal Constitutional Court, 1 BvR 712/20, 31 March 2020, unpublished.

<sup>85</sup> Ibid [12].

<sup>86</sup> Federal Constitutional Court, 1 BvR 755/20, 7 April 2020, unpublished.

<sup>87</sup> Ibid [10] – [11].

<sup>88</sup> Federal Constitutional Court, 1 BvQ 29/20, 9 April 2020, unpublished.

<sup>89</sup> Higher Bavarian Administrative Court, 20 CE 20755, 9 April 2020, unpublished.

Finally, the Constitutional Court recently upheld in a preliminary ruling the ban enacted by the state of Hessa on religious services, affecting a catholic applicant wishing to attend Easter mass.<sup>90</sup> The Court found a particularly significant infringement of the applicant's fundamental rights to practice their religious beliefs, but ultimately concluded that the mass gathering would constitute a severe threat for the life and health of the public. On balance, therefore, the ban was upheld on the basis of a balancing of harms. However, the decision emphasised that the periodic reviews ensured by the sunset clauses contained in the delegated legislation were crucial to this finding.<sup>91</sup> Conversely, delegated legislation banning religious services in state of Lower Saxony was successfully challenged by a Muslim community because it provided a blanket ban without the possibility of exemptions.<sup>92</sup>

Naturally, the eventual outcome of these cases cannot be determined based on the decisions to deny injunctive relief. The Constitutional Court in particular has indicated that it will subject delegated legislation to in-depth scrutiny during the main proceedings. In the short-term however, this means that the lockdown measures are likely to prevail in most cases given the limited standard of review in preliminary rulings. This does not appear as problematic, provided that courts are not unduly deferential to local authorities and provide relief against more outlandish lockdown measures.<sup>93</sup> The Constitutional Court for instance granted partial relief to applicants who were refused permission by local authorities to hold a thirty person protest against lockdown measures, despite the fact they had detailed plans for strict social distancing.<sup>94</sup> The local authorities had falsely assumed to have no discretion within the boundaries of the Hessian delegated legislation.

#### IV. Enforcement

Although the IDPA is a federal statute, the role of the Federal government in its enforcement and implementation is limited. Article 83 Basic Law provides for the exclusive competence of the Länder in enforcing federal law. Hence, the implementation of IDPA falls to the Länder and by extension local authorities, not the Federal government. This has permitted a degree of regional variation in lockdown measures, including with respect to re-opening certain businesses and requiring face masks in public.<sup>95</sup>

<sup>90</sup> Federal Constitutional Court, 1 BvQ 28/20, 10 April 2020, unpublished.

<sup>91</sup> Ibid [14].

<sup>92</sup> Federal Constitutional Court, 1 BvQ 44/20, 29 April 2020, unpublished.

<sup>93</sup> For instance, Bavarian police claimed that reading a book alone on a park bench was prohibited under lockdown legislation, which has since been retracted, see Maximilian Gerl, '[Bayerns große Parkbank-Posse](#)' *Süddeutsche Zeitung* (8 April 2020) <<https://www.sueddeutsche.de/bayern/corona-bayern-parkbank-regelaenderung-1.4872090>> accessed 22 April 2020.

<sup>94</sup> Federal Constitutional Court, 1 BvR 828/2, 15 April 2020, unpublished.

<sup>95</sup> See, '[Ladenöffnung in Coronavirus-Krise in vielen Bundesländern angelaufen](#)' *Deutschlandfunk* (20 April 2020) <[https://www.deutschlandfunk.de/covid-19-ladenoeffnung-in-coronavirus-krise-in-vielen.1939.de.html?drn:news\\_id=1122536](https://www.deutschlandfunk.de/covid-19-ladenoeffnung-in-coronavirus-krise-in-vielen.1939.de.html?drn:news_id=1122536)> accessed 22 April 2020; '[Wo und ab wann gilt die Maskenpflicht?](#)' *Tagesschau* (22 April 2020) <<https://www.tagesschau.de/inland/corona-maskenpflicht-103.html>> accessed 22 April 2020.

However, in response to covid-19 the IDPA has been amended, providing the Federal Minister of Health with novel powers that they can exercise when and if the Bundestag (German Parliament) declares a ‘national pandemic state of emergency’ (§ 5 para 2, number 1). Most of the powers contained in the IDPA appear sensible in principle but require further scrutiny because they give significant powers to the federal executive, notably the Federal Minister for Health.

First, the Minister is empowered to require individuals returning from overseas travel to provide health related information and submit to examination. Individuals who fail to comply face fines of up to 25,000 Euros. This provision departs from the otherwise state focused enforcement and implementation of IDPA and has been viewed as incompatible with Article 83 of the Basic Law.<sup>96</sup> Any exceptions would require an express constitutional provision and, in this case, likely a constitutional amendment.

Second, the Federal Minister is empowered to provide exemptions from IDPA rules and delegated legislation passed on this basis at their discretion without the consent of the Bundesrat (§5 para 2, number 3). The provision is problematic from a constitutional perspective because it effectively side-lines the states in the legislative process and concentrates power in the federal executive in a manner that the Basic Law generally does not permit. However, it is worth mentioning in this context that measures and delegated legislation adopted under these provisions are subject to a sunset clause and explore when the pandemic is declared over, or at the latest on 21 March 2021 (§ 5 para 4).

The Federal Minister is also empowered to provide for exemptions from a swathe of statutes through delegated legislation without scrutiny through the Bundesrat: this notably includes the Medicinal Products Act, Narcotics Act, Pharmacy Act and volume five of the Social Security Act, as well as delegated legislation enacted on this basis. Chiefly, the exemptions are permitted in the interest of safeguarding the supply of medical equipment and supplies as well as securing the continued operation of health care and social care system (§5 para 2, numbers 4 – 8).

Both of these provisions are problematic because Article 80 para 1 of the Basic Law expressly only permits specifications of statutory provisions through delegated legislation, not providing exemptions for unspecified provisions without parliamentary oversight: in short, the constitution does not generally permit delegated legislation to deviate from their statutory basis, nor provide exemptions from statutory provisions.<sup>97</sup>

The constitutional issues with respect to Article 80 and 83 of the Basic Law would render the changes to IDPA unconstitutional, notwithstanding that their substance may be desirable to

<sup>96</sup> Christoph Möllers, [‘Parlamentarische Selbstentmächtigung im Zeichen des Virus’](https://verfassungsblog.de/parlamentarische-selbstentmaechtigung-im-zeichen-des-virus/) (*Verfassungsblog*, 26 March 2020) <<https://verfassungsblog.de/parlamentarische-selbstentmaechtigung-im-zeichen-des-virus/>> accessed 14 April 2020.

<sup>97</sup> The constitutionality of these power conferring provisions has been questioned by some commentators, see for instance Pierre Thielbörger and Benedikt Behlert, [‘COVID-19 und das Grundgesetz: Neue Gedanken vor dem Hintergrund neuer Gesetze’](https://verfassungsblog.de/covid-19-und-das-grundgesetz-neue-gedanken-vor-dem-hintergrund-neuer-gesetze/) (*Verfassungsblog*, 30 March 2020) <<https://verfassungsblog.de/covid-19-und-das-grundgesetz-neue-gedanken-vor-dem-hintergrund-neuer-gesetze/>> accessed 14 April 2020.

effectively tackle the current crisis. IDPA has not yet been challenged as such through judicial review, and no delegated legislation granting exemptions has thus far been enacted by the federal executive under its newly introduced powers. However, when this does occur, the reluctance of courts to grant injunctive relief against measures adopted by local authorities indicate that it is unlikely the reforms would be thwarted in a preliminary ruling.

Ultimately, the Federal Minister is accountable to the Federal Chancellor for the exercise of these powers pursuant to Article 64 Basic Law, which contains the power of the Chancellor to seek the dismissal of a Minister from the Federal President. The Chancellor, in turn, is responsible to the Bundestag and may be removed through a so-called constructive vote of no-confidence: a majority of MPs withdraw their confidence from the Chancellor and successfully vote an alternative candidate into power (Article 67 Basic Law). The process hence does not typically lead to a general election, an example of the German constitutional hesitance to dissolve the Bundestag.<sup>98</sup>

## V. Summary Evaluation

<b>Best Practices</b>
<ul style="list-style-type: none"> <li>• Sunset clauses are provided for measures under the federal Infectious Disease Prevention Act (IDPA), and the corresponding powers of the federal government are available only if a ‘pandemic state of emergency’, has been proclaimed by the Bundestag (Federal Parliament)</li> <li>• A politically coordinated national strategy is legally specified and implemented by the Länder and local authorities, permitting some regional variation</li> <li>• Courts remain open with adjustments for social distancing in courtrooms and judges working from home</li> <li>• Courts conduct limited review of lockdown measures based on harm assessment in preliminary rulings, subject however to full hearings at a later stage</li> <li>• Courts have overturned some blanket bans, and required sunset clauses as well as regular political review of lockdown measures imposed by the Länder (German states) through delegated legislation</li> </ul>
<b>Concerns</b>
<ul style="list-style-type: none"> <li>• Federal powers to enforce some provisions of IDPA conflict with the general Länder responsibility for the implementation of federal law under the constitution (Article 83 Basic Law)</li> <li>• Provisions of IDPA that grant the Federal Minister of Health broad powers to provide exemptions from statutory requirements without oversight from Bundesrat (Representative body of Länder) conflict with the legal status of delegated legislation and amendment requirements for statutes (Article 80 Basic Law)</li> <li>• There is a risk, but as yet only sporadic evidence, that courts could be overly deferential to the government lockdown measures in preliminary rulings</li> </ul>

<sup>98</sup> Stefan Theil, [‘An Aversion to Weimar - German Constitutional Hesitance on Dissolving the Bundestag’](#) (*UK Constitutional Law Blog*, 23 November 2017) accessed 9 November 2019.

# HONG KONG

*Lisa Hsin*

## I. Constitutional Framework

The People's Republic of China resumed sovereignty over Hong Kong on 1 July 1997. A Hong Kong Special Administrative Region was established in accordance with the provisions of Article 31 of the Constitution of the People's Republic of China, and in accordance with the principle of 'one country, two systems', with the socialist system and policies not to be implemented in Hong Kong. The basic policies of the People's Republic of China regarding Hong Kong are now enshrined in the 'Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China'. The Human rights protection is enshrined in Article 4 of the Basic Law and 5h3 Bill of Rights Ordinance (Cap.383). By virtue of the Bill of Rights Ordinance and Basic Law Article 39, the International Covenant on Civil and Political Rights (ICCPR) was put into effect in Hong Kong. Any legislation that is inconsistent with the Basic Law can be set aside by the courts.<sup>99</sup>

## II. Overview of key provisions

In Hong Kong, the Government has made emergency regulations under two statutes. One is the [Emergency Regulations Ordinance 1922](#) (Cap. 241), the other is the Prevention and [Control of Disease Ordinance 2008 \(PCDO\)](#) (Cap599).

The Emergency Regulations Ordinance (**ERO**) empowers the Chief Executive, the head of the Government, to make regulations on extremely broad terms. The Chief Executive can make 'any regulation whatsoever' which she 'may consider to be in the public interest' (s.2(1), ERO) in any situation she 'may consider to be an occasion of emergency or public danger'. The ERO was enacted nearly a hundred years ago and has an unsavoury history in the colonial era. In October 2019, the Chief Executive invoked the ERO to create an anti-mask regulation to ban masks at public gatherings, in an attempt to quell the ongoing protests.<sup>100</sup>

The Hong Kong government also enacted delegated legislation pursuant to the PCDO. The Ordinance allows the Government to make regulations for the purposes controlling and preventing the spread of disease among human beings; or to apply relevant measures of the International Health Regulations promulgated by the World Health Organization. The key pieces of secondary regulations made so far in relation to COVID-19 are:

- [Prevention and Control of Disease Regulation](#)

<sup>99</sup> Article 19, Hong Kong Basic Law, adopted on 4 April 1990, effective since 1 July 1997.

<sup>100</sup> Geoffrey Yeung, 'Fear of Unaccountability vs Fear of a Pandemic: COVID-19 in Hong Kong' (14 Apr 2020) [Verfassungsblog on Constitutional Matters](#).

- [The Prevention and Control of Disease \(Prohibition on Group Gathering\) Regulation](#)
- [Prevention and Control of Disease \(Requirements and Directions\) \(Business and Premises\) Regulation](#)
- [Compulsory Quarantine of Persons Arriving at Hong Kong from Foreign Places Regulation](#)
- [Prevention and Control of Disease \(Disclosure of Information\) Regulation](#)

### **III. The use of the Emergency Regulations Ordinance (ERO)**

The ERO was most recently invoked in October 2019 by the Chief Executive, Carrie Lam, to counter pro-democracy protests. The powers it grants are traditionally reserved for a state of ‘public emergency which threatens the life of a nation.’ It grants the passing of emergency regulations to the executive alone, it trumps all other laws, and there is no requirement for periodic review. In short, the ERO theoretically gives the Hong Kong government free rein to restrict human rights but provides no safeguards against abuse.

The use of executive power under the ERO was invoked to prohibit the use of face masks in October 2019. An attempt by pro-democracy lawmakers to halt the use of the ERO failed at preliminary hearings, but a fast-tracked judicial review partially reversed the decision and found against the government in its substantive judgment on 18 November 2019.<sup>101</sup> The latter finding was more in line with the Hong Kong’s Basic Law, also known as Hong Kong’s mini-constitution, the Hong Kong Human Rights and Democracy Act 2019 and international human rights law.<sup>102</sup> However, a day after the substantive judgment was released, the Legislative Affairs Commissions of the Standing Committee of the National People’s Congress (*NPCSC*) (the top legislative body in China) issued a statement saying that only the NPCSC has the power to determine and decide whether Hong Kong local laws are compatible with the Basic Law<sup>103</sup>; no other institutions are vested with such powers, effectively striking down the judicial decision. This is very worrying and highlights a discrepancy within the Basic Law: Under Article 158 of the Basic Law, the final interpreter of the Basic Law is the NPCSC, but Article 19 of the Basic Law vests the final adjudicative power in the Court of Final Appeal.<sup>104</sup>

There are also reports that the police force is already using these new regulations for political purposes. Even though the regulations make clear that any power exercised must be in good faith and reasonable in the circumstances, there are real signs and substantial risks of the abuse of power.<sup>105</sup> It has been reported that 15 pro-democracy activists were arrested since the

<sup>101</sup> *Kwok Wing Hang and Others v Chief Executive in Council* [2019] HKCFI 2820.

<sup>102</sup> Jan Wetzel, ‘The Hong Kong Government’s Use of Emergency Regulations Must Be Challenged’ (22 October 2019) [The Times](#).

<sup>103</sup> Zhao Wenhan, ‘A spokesman for the Legal Work Committee of the Standing Committee of the National People’s Congress on the Judgment Review Judgment of the Hong Kong Court’ (19 November 2019) [Xinhuanet.com](#).

<sup>104</sup> Julius Yam, ‘Hong Kong’s Anti-mask Law: A Legal Victory with a Disturbing Twist’ (3 December 2019) [IACL-AIDC Blog](#) (part of the International Association of Constitutional Law).

<sup>105</sup> Europe Solidaire Sans Frontières, ‘Hong Kong two viruses: Covid 19 and government repression against democratic movement Police arrest 54 at Hong Kong’ (1 April 2020) [Europe Solidaire Sans Frontières](#).

coronavirus pandemic began.<sup>106</sup> Those arrested, such as Lee Cheuk Yan, a leading figure of the movement says Hong Kong's government is using Covid-19 crisis as a 'golden opportunity' for crackdown, to prevent potential candidates from running in upcoming elections.<sup>107</sup>

#### **IV. Role of courts**

A General Adjourned Period is currently in place. This means that all court and tribunal hearings will be postponed during this period unless they are urgent or deemed 'essential business'. If that is the case, parties will be notified that their scheduled hearings are going ahead. All judicial announcements can be found on the Judiciary's website. On 15 April 2020, the [Chief Justice of the Court of Final Appeal](#) announced:

*'Since taking office in 2010, the Chief Justice has not at any stage encountered or experienced any form of interference by the Mainland authorities with judicial independence in Hong Kong, including the appointment of judges. Judicial independence is guaranteed under the Basic Law and is a main component of the rule of law in Hong Kong.'*

Legislative and judicial oversight of executive orders are available but limited in the circumstances. Regulations made under the PCDO are subsidiary legislation. This means that after they are made, they would be tabled before the Legislative Council for 28 days of 'negative vetting', during which the regulations would already be in force but Legislative Council may still propose amendments to them. However, half of the Legislative Council is not democratically elected and it is practically impossible for the Legislative Council to amend the regulations without Government support, which critically undermines the legitimacy and effectiveness of Legislative Council's oversight.

#### **V. Liability and compensation**

Protection from liability and compensation provisions are set out in the PCDO. Section 8 and 12 of the PCDO sets out narrow and specific circumstances for compensation. These pertain to when property is requisitioned, or where any article is damaged, destroyed, seized, surrendered or is submitted to any person pursuant to this Ordinance. The Health Director may order the payment of what is just and equitable in the circumstances.

Section 13 provides immunity from personal liability of health or police officers or a person acting under his direction in good faith in the exercise or purported exercise of a power, or performance or purported performance of a function, under the PCDO. The section expressly states that the immunity does not affect any liability in tort of the Government for that act or omission, this means the Hong Kong government could potentially be liable for negligence, false imprisonment and other civil wrongs. Section 12 sets the procedure for making such

<sup>106</sup> Reuters, 'US and UK condemn arrest of Hong Kong democracy activists' (19 April 2020) [The Guardian](#).

<sup>107</sup> Helen Davidson, 'Hong Kong using Covid-19 crisis as 'golden opportunity' for crackdown, says arrested leader' (20 April 2020) [The Guardian](#).

claims. Section 12, which sets out the procedure for making such claims gives claimants 6 months to initiate proceedings or arbitration. Normally, the limitation period for claims in contact or tort is six years from the date on which the cause of action was accrued (Section 4(1) of the Limitation Ordinance). In practice, there are barriers to access to justice, especially with the courts in adjournment.

## **VI. Enforcement and expiration**

The ERO does not require the Government to undertake periodic review.

The PCDO provides authorities powers of seizure and forfeiture, powers of arrest and detention. In particular, if an authorised health officer or police officer reasonably suspects that a person has committed or is committing an offence under the Ordinance and its delegated regulation, the health officer or the police officer may stop, detain or arrest that person without warrant.

A person who contravenes the Ordinance and the regulations commits an offence and is liable on conviction to a fine of up to level 3 (HK\$10,000 which is approx. GB£1,035) and to imprisonment for 6 months.

The expiration dates of the delegated laws are as follows:

- Prevention and Control of Disease Regulation has no expiration date.
- The ‘Prohibition on Group Gathering Regulation’ expires at midnight on 28 June 2020. (It is worth pointing out that the prohibition on group gatherings has the longest duration period but the specified period for the lockdown is for an initial 14 days (i.e. until 11 April)).
- The ‘Requirements and Directions and Business and Premises Regulation’ expires at midnight on 27 June 2020.
- The ‘Compulsory Quarantine of Persons Arriving at Hong Kong Regulation’ expires at midnight on 18 June 2020.
- The ‘Disclosure of Information Regulation’ expires at midnight on 7 May 2020.

## **VII. Invasions of privacy**

Many commentators have expressed concerns at the use of mobile phone apps to locate members of the public during the lockdown and trace members of the public who may have been in close contact with someone infected by COVID-19. In most jurisdictions, the government collects data through mobile phone networks, WiFi connections and other surveillance assemblages to reveal the location of individuals and crowds. This raises obvious privacy concerns.

The Privacy Commissioner for Personal Data, Hong Kong (**PCPD**) released a statement to clarify the privacy law position on the use of information on social media for tracking potential

carriers of COVID-19 (**PCPD Statement**).<sup>108</sup> The PCPD Statement states that whilst the general rule is that personal data obtained from social media must be used consistent with or directly related to the original purpose for which the data is collected, i.e. subject to the Personal Data (Privacy) Ordinance (Cap 486) (**PDPO**), the general rule is subject to a limited health exception from certain sections of the PDPO. Section 59 of the PDPO provides an exemption if the use of data relates to safeguarding the physical or mental health concerns of the data subject or any other individual in the public interest. In particular, section 59(2) of the PDPO states that in circumstances where the application of the restrictions on the use of data would be likely to cause ‘serious harm’ to the physical or mental health of the data subject or any other individual, personal data relating to the identity or location of the data subject may be disclosed to a third party without the consent of the data subject/individual.<sup>109</sup>

In Hong Kong, apps with maps to track the disease are said to have evolved into the ‘Alipay Health Code’, a system that classifies residents based on an opaque methodology.<sup>110</sup> Once a survey has been filled out by a user, this data gets combined with other sources such as location data. Once the data has been analysed, a QR code is generated which has one of three colours; green enables its bearer to unrestricted movement, a yellow code may require the user to stay home for seven days, and a red QR code results in two-weeks of quarantine. This type of technology, combined with disclosure obligations under the ‘Disclosure of Information Regulation’ and the PDPO means, any breach of the general rule on the use of data without consent may be excused or saved by the fact that the misuse arises from the need to protect public health.

## **VIII. Summary Evaluation**

<b>Best Practices</b>
<ul style="list-style-type: none"> <li>• Sunset/expiry clauses for delegated regulation clearly set out</li> <li>• Compensation may be available if property is requisitioned by the Government, or where any article is damaged, destroyed, seized, surrendered to the Government in connection with Covid-19</li> <li>• Citizens may claim in tort against the Government for any act or omission (however, this is also concern because the Prevention and Control of Disease Ordinance (Cap. 599) requires that claims of this kind must be made within 6 months of the act or omission, whereas normal limitation period for tort claims is 6 years)</li> </ul>
<b>Concerns</b>
<ul style="list-style-type: none"> <li>• The Emergency Regulations Ordinance grants the passing of emergency regulations to the executive alone, it trumps all other laws, and there is no requirement for periodic review leading to an executive-centric response</li> <li>• No oversight mechanisms by Parliament or any other governmental body</li> </ul>

<sup>108</sup> The Privacy Commissioner for Personal Data, ‘Media Statement: The Use of Information on Social Media for Tracking Potential Carriers of COVID19’ (26 February 2020) [PCPD](#).

<sup>109</sup> Osborne Clarke Insights, [‘Coronavirus and social media tracking in Hong Kong | what are the data privacy law implications?’](#) (10 Mar 2020).

<sup>110</sup> Latest Situation of Coronavirus Disease (COVID-19) in [Hong Kong app](#).

- Police appear to be taking advantage of new regulations for political ends and are exercising excess force
- Personal data relating to the identity or location of the data subject may be disclosed to a third party without the consent of the data subject/individual and used for unintended purposes leading to serious privacy concerns
- All court and tribunal hearings are postponed indefinitely and the independence of the judiciary has been called into question by commentators and media

# INDIA

*Dr Shreya Atrey*

## I. Overview

This section examines the legality of measures taken in response to the novel Coronavirus in India. The report focusses on the main legislative and regulatory steps taken to enforce lockdown and social distancing measures. It tests these measures against public law standards in India, including for their compliance with fundamental rights contained in Part III of the Constitution.

The section concludes that while the measures are legal at the time of their passage, their continued legality depends on their implementation. There is considerable evidence that actions taken under the measures have gone beyond the limits of legality under public law. In particular, **the lack of public health and social security focus** defines the State response which has instead been dominated by **excess in policing**. The result can only properly be described as a **humanitarian crisis writ large**.

The section covers the initial period 11.03.2020 – 11.04.2020, i.e. the first month in which the measures were announced. These measures have since been extended.

## II. Current Measures

### a. Constitutional Scheme

From a constitutional perspective, there are two significant things to note. First, that the legislative powers of the Centre and the States are delineated under the Constitution. Under articles 245 and 256 of Constitution, the Parliament can legislate on subjects enumerated under ‘List I’ of the Seventh Schedule of the Constitution and the State legislatures on subjects enumerated under ‘List II’; while both have the power to legislate on subjects under ‘List III’. Entry 6 of List II includes ‘public health and sanitation; hospitals and dispensaries’ and entry 29 of List III includes ‘prevention of the extension from one State to another of infectious or contagious diseases or pests affecting men, animals or plants.’ Thus, while public health is exclusively a matter within the domain of State legislatures, prevention of contagious diseases is a concurrent matter between the Centre and the States.

The second important element to note is that a constitutional emergency has *not* been invoked. Arguably, this may have been permissible under Part XVIII of the Constitution. But this would have made the Central government the sole arbiter of the crisis. For a crisis of this nature and scale where the cooperation of State governments is indispensable, declaring an emergency would have been inappropriate and counter-productive.

### **b. Legislative and Regulatory Measures**

Pursuant to the essentially federal constitutional scheme outlined above, the following regulatory measures have been taken. On 11.03.2020, the Central government invoked section 69 of the Disaster Management Act, 2005 to delegate powers to the Secretary of Ministry of Health and Family Welfare to provide for ‘an exhaustive administrative set up for disaster preparedness.’ The Centre then issued guidance to all the thirty States to invoke section 2 of the Epidemic Disease Act, 1897 and take appropriate measures ‘to prevent the outbreak of [dangerous epidemic disease] or the spread thereof.’ Most States have modified and adopted more recent versions of the 123-year old Epidemics Act. The State governments have thus promulgated their own measures under their respective legislative schemes. For example, Delhi Epidemic Diseases, COVID-19, Regulations, 2020 and Maharashtra COVID-19 Regulations, 2020 were passed on 12.03.2020 and 14.03.2020 respectively, which directed people to self-isolate and quarantine, well before the official quarantine guidance was issued by the Central government on 24.03.2020. This guidance, largely replicated in State regulations, prohibits people from leaving homes, bans all public transport including not only planes and ships but also trains and buses, and orders all businesses to close, including essential services like grocery stores and pharmacies. Less than three hours of notice was given until the beginning of measures in this advisory which commenced at midnight of 25.03.2020.

States have also invoked other civil and criminal measures. For example, in a small section in Bombay within the State of Maharashtra, Section 144 of Criminal Procedure Code (CrPC) has been invoked to prevent and punish unlawful assemblies of more than five people. Kerala issued its Epidemic Ordinance on 27.03.2020 which is a more comprehensive tool to combat the epidemic under a single consolidated law rather than having to invoke a series of laws.

The Centre too has continued to issue other advisories, for example, in relation to visas and border control from time to time. Visa and other travel restrictions were placed on non-Indians starting from 13.03.2020 and violators have been deported or their visas cancelled with penalty. Another example is the Ministry of Consumer Affairs, Food & Public Distribution notification on 13.03.2020 which declared masks and hand sanitisers as ‘essential commodities’ until 30.06.2020 under the Essential Commodities Act, 1955. This was followed by an advisory under the Legal Metrology Act, 2009 directing the States to order manufacturers to enhance production and supply chain for these items. Further, the prices of these items have been sealed at the Maximum Retail Price (MRP) to prevent black marketing or hoarding.

### **c. Judicial Orders**

The Supreme Court of India and the various high courts have been issuing orders during this time. The Supreme Court of India has both been issuing these orders taking suo moto cognisance of issues as well as being approached by interested parties who still have access to the Court which has since been working only on important matters and with fewer personnel. For example, in one of its first orders, the Supreme Court migrated to remote and virtual working to be able to continue in business for urgent matters. It has since directed state

governments to release under trial inmates for crimes punishable with a maximum sentence of seven years and prisoners serving less than seven years of sentence. It has ordered for Coronavirus tests to be conducted free in both public and private labs. This order, while welcome, has been challenged by private labs for having imposed an undue burden on them and thus arguably violating their right to freedom of occupation, trade or business under article 19(1)(g) of the Constitution. It has also directed state governments to ensure payment of wages to migrant workers during the lockdown period.

### **III. Implementation**

None of the measures taken by the Central and State governments lack constitutional or statutory authority. They are thus intra vires and do not exceed the formal limits of law placed in making provisions to prevent and address the spread of Coronavirus in India. However, the implementation of the measures has foundered. There are two significant problems which have emerged: first, the de facto imposition of an unauthorised curfew, and second, the lack of focus on health and social security.

#### **a. ‘It’s not the lockdown; it’s almost a curfew’<sup>111</sup>**

##### *i. Violation of Article 19(1)(d) of the Constitution*

Social distancing, lockdown and quarantine have operated essentially as a curfew, placing restrictions on movement outside home, when no such authority or direction seems to authorise it in the parent legislation or regulations issued under it. A bare perusal of the text of these regulations issued by States and the Central government advisories shows only restrictions on social or public gatherings or functions and not a complete ban on movement of persons, say for the purposes of accessing essential services or for recreation and exercise while observing social distancing rules. This is in violation of article 19(1)(d) guaranteeing freedom of movement which cannot be restricted unless reasonable and in public interest under article 19(5) of the Constitution. Ban on **all** individual movement in the name of ‘social distancing’, which inevitably requires interaction of more than one person and beyond those in the same household (with whom one cannot social distance), is unnecessary and violates both the reasonableness standard of review,<sup>112</sup> as well as proportionality review<sup>113</sup>—the two tests applicable to rights review in India.

<sup>111</sup> An Interview with Jean Dreze (1 April 2020) The Outlook India.

<sup>112</sup> *Budhan Choudhury v State of Bihar* AIR 1995 SC 191 ('the classification must be founded on an intelligible differentiation which distinguishes persons or things that are grouped together from others left out of the group...that differentia must have a rational relation to the object sought to be achieved by the statute in question.').

<sup>113</sup> *Modern Dental College and Research Centre v State of Madhya Pradesh* (2016) 7 SCC 353.

*ii. Violation of the right to security of person under Article 21 of the Constitution*

The lockdown measures in the Regulations explicitly ban certain essential services including transport, which may be necessary for workers in essential services like hospitals and mortuaries to be able to reach places of work. The lockdown has specifically been used to ban movement, including of transport of essential goods and services. Takeout and delivery services for food supplies have been forced shut, potentially detrimental to sick, elderly and disabled populations, amongst others. Shops and vendors selling essential commodities like groceries, fruits and vegetables have been sealed. The result of this overreaching interpretation of lockdown rules has been increased policing in States with reports of police brutality pouring in. People have been humiliated, abused and beaten not only for violating social distancing and self-quarantine, but for performing their daily and essential jobs like accessing farms to pick vegetables and selling them in town, or supplying milk and ration to vendors.<sup>114</sup> Journalists have been detained and harassed for doing their jobs.<sup>115</sup> People have been targeted for simply accessing groceries to keep themselves fed and for feeding others dependent on them. The rampant and reckless use of force by police is a clear violation of fundamental rights, especially the right to life under article 21 of the Constitution.

*iii. Violation of the right to privacy under Articles 14 and 21 of the Constitution*

Quarantine measures, which were meant to be self-observed, have been enforced by releasing travel information and current addresses of those with a travel history. Identifiers such as semi-permanent ink stamps are being used to identify and segregate those meant to be under the 14-day quarantine, whether they are symptomatic or not. This is a clear breach of the right to privacy guaranteed under articles 14 and article 21 of the Constitution. Under article 14 which guarantees the right to equality, the measures may be capable of classifying those with a travel history, but they lack a reasonable connection with the specific measures like making travel histories and personal information available to the public large. In addition, these measures, especially the wording of the Regulations, which authorise unrestrained surveillance violate the right to privacy under article 21 of the Constitution. For example, the Delhi Regulations prohibit ‘unauthorised dissemination of COVID information in print or electronic media’, while also allowing the State ‘right to coercive surveillance, inspection, inquiry and examination’. The latter is too open-ended and unconstrained to be an effective and lawful guidance for enforcers. It is disproportionate at every level of the proportionality test—for lacking a clearly defined legitimate aim, for having a suitable link to that legitimate aim, for being necessary as an effective means of carrying out that aim.

<sup>114</sup> ‘Coronavirus lockdown in India: “Beaten and abused for doing my job”’ (28 March 2020) [BBC News](#).

<sup>115</sup> ‘Cops beat up people out to buy, sell food’ (25 March 2020) [The Telegraph](#).

## b. ‘Poverty may kill us first’<sup>116</sup>

The Central and State measures are concentrated on containment through self-isolation, quarantine and lockdown and have essentially been implemented through policing, which has been both coercive and excessive. This exposes the lack of health and social security focus, which has been debilitating for the poor and other socially disadvantaged groups in India. The measures are thus patently in breach of the right to equality and non-discrimination under Articles 14 and 15 because they discriminate against the poor and the marginalised communities;<sup>117</sup> and the right to life under Article 21 of the Constitution of India which has been interpreted by the Supreme Court to include the right to health,<sup>118</sup> the right to food,<sup>119</sup> right to livelihood<sup>120</sup> and the right to shelter.<sup>121</sup> The cumulative long-term impact of these measures though is hardly computable as violations of these individual human rights, but as a humanitarian crisis writ large.

### i. Violation of the Right to Health under Article 21 of the Constitution

First, none of the measures, either under the Epidemic Diseases Act or under the Disaster Management Act, is guided by a scientific and public health approach to the crisis. The emphasis on isolation, quarantine and lockdown is only part of a much larger set of measures needed to combat the crisis, most significant of which is the focus on health care. The role of healthcare and medical science in containment, testing, treatment and prevention is absent. Much has to do with the archaic nature of the Epidemic Diseases Act, a colonial statute, written in a different era of healthcare medicine and scientific advancement.<sup>122</sup> It is thus ‘regulatory’ in nature, with no public health or human rights focus.<sup>123</sup> Simple but urgent issues like provision of personal protective equipment (PPE) for healthcare workers have been neglected, with the government having banned the export of PPE on 19.03.2020, a month later than the WHO advisory telling countries to create stockpiles. Similarly, with the least amount of testing per capita than any other country reporting during this crisis, availability, supply, cost and efficacy of testing have been left out of the remit of law. The Supreme Court has now intervened to mandate free testing, but the intervention seems ineffective and potentially

<sup>116</sup> Barkha Dutt, ‘As India goes into lockdown, fear spreads: “Poverty may kill us first”’ (26 March 2020) The Washington Post.

<sup>117</sup> *State of Maharashtra v Hotel Association of India* (2013) 8 SCC 519.

<sup>118</sup> *Bandhua Mukti Morcha v Union of India* AIR 1984 SC 802; *Paschim Banga Khet Mazdoor Samity v State of West Bengal* AIR 1996 SC 2426; *C.E.S.C. Ltd v Subhash Chandra Bose* AIR 1992 SC 573.

<sup>119</sup> *Ahmedabad Municipal Corporation v Nawab Khan Gulab Khan* (‘Right to food is an inbuilt and inalienable part of right to life which cannot be compromised on any ground. Right to live guaranteed in any civilised society implies the right to food, water, decent environment, education, medical care and shelter’).

<sup>120</sup> *Olga Tellis v Bombay Municipal Corporation* AIR 1986 S 180.

<sup>121</sup> *Shantistar Builders v Narayan Khimalal Totame* AIR 1990 SC 630; *Chameli Singh v State of UP* [1996] 2 SCC 549.

<sup>122</sup> BK Patro, JP Tripathy JP and R Kashyap R, ‘Epidemic diseases act 1897, India: whether sufficient to address the current challenges?’ (2013) 18 J Mahatma Gandhi Inst Med Sci. 109.

<sup>123</sup> PS Rakesh, ‘The Epidemic Diseases Act of 1897: public health relevance in the current scenario’ (2016) 1 Indian J Med Ethics. 156, 158.

disruptive in the absence of a considered view of healthcare in India.<sup>124</sup> All this is perhaps only characteristic of the Hindu-nationalist government which has been heavily criticised for its ‘unscientific thinking,’<sup>125</sup> having diverted resources in recent years to Ayurveda, Homeopathy and Unani medicine. India lacks the medical infrastructure and resources to be able to avert a public health disaster, but public law powers have not been used to tackle this problem which is at the heart of the crisis. This is a violation of the right to health, especially the right to emergency healthcare which has been explicitly recognised by the Supreme Court as part of Article 21 on the right to life.<sup>126</sup>

*ii. Violation of the Rights to Food, Shelter and Livelihood under Article 21 of the Constitution*

The right to life under article 21 of the Constitution has been firmly established as guaranteeing a life beyond ‘mere animal existence’<sup>127</sup> and with ‘an adequate standard of living.’<sup>128</sup> The right has thus been interpreted to include a range of interests in social security which were earlier only included in the Directive Principles of State Policy under the Constitution that are unenforceable.<sup>129</sup> Much like the right to health, with the inclusion of rights such as the right to food, right to livelihood and the right to shelter,<sup>130</sup> socio-economic rights are now enforceable. The measures pay no heed to the obligations which arise under these rights, including the obligation to respect, protect and fulfil these rights.

The measures were brought forth without regard to their impact on the poor, thus triggering a humanitarian crisis affecting the poorest and the most vulnerable sections of the society.<sup>131</sup> With over 90% of the economy reliant on unorganised or informal work (without stable contract, pay or benefits),<sup>132</sup> the sole and immediate focus on lockdown left nearly 500 million workers in India without means to support themselves or their families. The nature of life in the informal sector is essentially hand-to-mouth, with workers having little if any savings or food stocks or even permanent shelters (let alone homes).<sup>133</sup> In particular, the lockdown left over 100 million migrant workers trapped, without shelter, food or transportation to get them home. Rag pickers, street vendors, labourers, construction workers and rickshaw pullers have not only lost their livelihoods but potentially risk their lives, period, being left hungry and malnourished to ever be able to recover, if they survive at all. These measures violate the right

<sup>124</sup> See for a vociferous debate on the merits of this order, ‘Coronavirus and the Constitution – XVII: The Supreme Court’s Free Testing Order’ [Indian Constitutional Law and Philosophy](#) (9-11 April 2020).

<sup>125</sup> Vidya Krishnan, ‘The Callousness of India’s COVID-19 Response’ (27 March 2020) The Atlantic.

<sup>126</sup> *Bandhua Mukti Morcha v Union of India* AIR 1984 SC 802; *Paschim Banga Khet Mazdoor Samity v State of West Bengal* AIR 1996 SC 2426.

<sup>127</sup> *Kharak Singh v State of Uttar Pradesh* AIR 1963 SC 1295; *Maneka Gandhi v Union of India* AIR 1978 AIR SC 597; *Francis Coralie v Union Territory of Delhi* AIR 1981 SC 746.

<sup>128</sup> *Chameli Singh v State of UP* [1996] 2 SCC 549.

<sup>129</sup> See esp Directive Principles of State Policy under articles 38, 40, 41, 43, and 47.

<sup>130</sup> See nn 127-130.

<sup>131</sup> Harsh Mander, ‘A Pandemic in an Unequal India’ (1 April 2020) The Hindu.

<sup>132</sup> International Labour Organisation, ‘Women and Men in the Informal Economy – A Statistical Picture’ (Third edition) (May 2018).

<sup>133</sup> Manavi Kapur, ‘In charts: India’s migrant workers face anxiety over jobs, healthcare and food supplies’ (8 April 2020) [Scroll](#).

to food, right to shelter and the right to livelihood which are now recognised within the corpus of article 21 on the right to life.

*iii. Violation of the Right to Equality under Article 14 of the Constitution*

The differential impact of the measures on the poor violates article 14 of the Constitution which has been read by the Supreme Court to include a prohibition on regulatory measures which have a disproportionate impact on the poor, including in terms of their access to right to food, shelter and livelihood.<sup>134</sup>

While the government has belatedly announced a relief package, it amounts to less than 1% of the total GDP, and is minuscule in comparison to what is needed to feed, clothe, transport and shelter the poor.<sup>135</sup> Other countries have spent up to 20% of their annual GDP on relief packages.<sup>136</sup> While the package is wide-ranging, it still falls short in ensuring availability, adequacy, supply and distribution of essentials like food rations, income supplement and temporary shelter. Moreover, the measures can be accessed by those ‘registered’ or having some link to pre-existing schemes via identity cards or numbers (Aadhar, PAN, BPL, Ration cards etc). This leaves out homeless, beggars and those without any prior link or in possession of identity documents from accessing them. Displacement and rurality too will frustrate efforts to reach out to those in desperate need.

*iv. Violation of the Right to Non-Discrimination under Article 15(1) of the Constitution*

The effect of the measures on the poor is compounded by other vulnerabilities. The rise in Islamophobia and communalism has only fed into compounding the plight of the Muslim community. Tablighi Jamaat has become the epicentre of hate and blame, being called a site for ‘Corona Jihad’ or ‘Corona terrorism’ by members of the ruling Hindu-nationalist party.<sup>137</sup> Women and girls have been left without adequate access to reproductive care, including emergency health services for pregnant women and young mothers.<sup>138</sup> Despite fears of rise in domestic violence at home, few measures have been put in place to protect women and children during social isolation.<sup>139</sup> Similarly, the elderly and disabled population is potentially trapped in inadequate, abusive or exploitative institutions or homes.

<sup>134</sup> *State of Maharashtra v Hotel Association of India* (2013) 8 SCC 519.

<sup>135</sup> ‘Concerned citizens’ response to the COVID 19 relief package announced by the finance minister’ (27 March 2020) *The Caravan*.

<sup>136</sup> Radhika Merwin, ‘Covid-19 stimulus package: Centre’s Rs 1.7-lakh crore no match for global response’ (27 March 2020) *Business Line*, *The Hindu*.

<sup>137</sup> Akash Bisht and Sadiq Naqvi, ‘How Tablighi Jamaat event became India’s worst coronavirus vector’ (7 April 2020) [Al Jazeera](#).

<sup>138</sup> Ashwini Deshpande, ‘Protecting women is missing from pandemic management measures in India’ (28 March 2020) [Quartz India](#).

<sup>139</sup> Lachmi Deb Roy, ‘Domestic violence cases across India swell since Coronavirus lockdown’ (7 April 2020) [The Outlook](#).

#### **IV. Conclusion**

The approach of law and law enforcers in India has been to respond to Coronavirus through policing while ignoring the public health and social security dimensions of the crisis. The mismatch between means and ends has exacerbated the condition of the poor in India, who have been hit the worst. Thus, a change in tack is desperately required to reset the regulatory focus which respects not only individual human rights and Rule of Law, but also reconstructs the response to the crisis in essentially public health and social security terms for the benefit of the poor whose lives are at stake.

#### **V. Summary Evaluation**

<b>Best Practices</b>
<ul style="list-style-type: none"><li>• Constitutional emergency has not been invoked</li><li>• Based on the quasi-federal constitutional structure, the power of individual States has been respected in taking enforceable measures in response to the pandemic</li><li>• Courts remain open for essential and urgent matters</li></ul>
<b>Concerns</b>
<ul style="list-style-type: none"><li>• The excessive use of force by police in enforcing the lockdown measures across States without adequate inbuilt mechanisms of oversight</li><li>• The excessive restrictions on freedom of movement, including a prohibition on essential services like transport for key workers, beyond what is necessary</li><li>• The lack of engagement with socio-economic rights, in particular, the rights to food, health, shelter, livelihood and security under article 21 of the Constitution, leaving millions in dire circumstances</li><li>• The lack of a public health focus in the measures, including absence of emphasis on adequate testing and treatment of Coronavirus</li></ul>

# ITALY

*Dr Christos Kypraios*

As of 26 April 2020, Italy is [one of the most affected countries](#) by the COVID-19 pandemic with [197,675 confirmed cases](#) and [26,644 deaths](#). In an attempt to address the situation, the Italian government has adopted a series of intrusive regulatory measures which – albeit required to contain the spread of the disease – entail severe and unprecedented limitations on several civil rights and freedoms.<sup>140</sup> Following the declaration of a state of emergency on 31 January, the Italian government enacted and gradually intensified restrictions on mobility (e.g. prohibitions on accessing certain areas or on leaving the area of residence), assembly (e.g. suspension of public gatherings), educational services (e.g. closing of schools and universities) and economic activity (e.g. suspension of working activities for most enterprises) throughout the national territory.

This contribution is divided into three parts. Part A offers an overview of the regulatory measures taken as of 26 April 2020. Part B assesses the compatibility of the said measures with the Italian Constitution and the country's obligations under international human rights law, especially the ICCPR and the ECHR. Lastly, Part C offers some concluding remarks and discusses briefly the management of the public health crisis by the Italian government from a Rule of Law perspective.

## I. Regulatory measures in response to COVID-19

The legal response of the Italian government to COVID-19 developed in a similarly rapid pace to that of the spread of the disease in the country. The legal basis for the regulatory measures taken by the government to protect public health and security can be found in the Italian Constitution, and particularly Article 77 which provides that in extraordinary cases of necessity and urgency the Government can adopt temporary measures (decreti-legge/decreet-laws) that have the same force with ordinary laws.<sup>141</sup> Indeed, after declaring a [6-month state of emergency](#) on 31 January – the day that the virus was first confirmed to have spread to Italy – the Italian Council of Ministers (CM) adopted a series of decree-laws, the most relevant of which being the following:<sup>142</sup>

<sup>140</sup> Apart from those measures aimed at containing the spread of the disease, the Italian government has taken measures to support the national healthcare system and mitigate the economic effects of the crisis and the response measures. See e.g. the [Decree-law No. 18](#) of 17 March 2020.

<sup>141</sup> According to Art. 77, these measures are immediately binding upon adoption but must be transposed into law by the Parliament within sixty days of their publication.

<sup>142</sup> For a comprehensive list of the regulatory measures taken by the Italian government, [see the government website](#). It should be noted however that, apart from the decree-laws adopted by the central government on the basis of Art. 77 of the Italian Constitution, regions, municipalities and national authorities (such as civil protection authorities, or the Minister of Health) have also exercised emergency administrative powers recognised to them under the Italian legal system. Thus, a broad array of both regulatory and administrative acts has been enacted at the national, regional and local levels (e.g. several ministerial orders, and decrees of the Presidents of the main regions affected by the virus). The focus here is on the measures taken in the form of government decree-laws that have been mostly applied nationwide. For the coordination issues raised in Italy during the fight against

- On 23 February – shortly after the detection of a cluster of cases in Lombardy and the recording of the first deaths – the government adopted [Decree no. 6](#). The decree mandated “competent authorities to adopt all appropriate containment and management measures proportionate to the evolution of the epidemiological situation”,<sup>143</sup> and initiated the **lockdown phase** of the Italian government’s response.<sup>144</sup> According to the instrument, the categories of containment measures enumerated therein were to be enacted through subsequent decrees adopted by the President of the Council of Ministers (PCM) after consulting with the competent Ministers and Presidents of Regions; while until the issuance of these PCM decrees such measures could also be adopted through the exercise of the emergency administrative powers of other legal provisions.<sup>145</sup> The types of measures enumerated in the decree included: i) prohibition on leaving or accessing affected areas; suspension of events and all forms of meetings in public or private places, including gatherings of a cultural, leisure, sporting and religious nature; suspension of school and higher education activities (except for distance learning ones); closing and prohibition of access to museums and other cultural places; suspension of all commercial activities (excluding business linked to essential goods and services); closure or restriction of public offices, utilities and services; restrictions to public transport and to transport of goods; and quarantine ‘with active monitoring’ (home assistance and monitoring by healthcare services) of individuals who have had close contact with confirmed COVID-19 cases.<sup>146</sup>
- On 8 March, [a PCM decree](#) set regional limitations to mobility (preventing people from entering or leaving certain areas in the country, and prohibiting the residents of the latter areas from moving from their home unless “for proven occupational needs or situations of necessity or health reasons”), assembly, and economic activities, under the threat of fines and imprisonment of up to three months. The lockdown measures were to apply in the region of Lombardy and 14 northern provinces until 3 April, affecting 16 million people (almost a quarter of Italy’s population). Among others, the decree imposed the closing of cultural, leisure and wellness places (e.g. museums, gyms, cinemas, theatres, bars) and shopping centres (the latter only during the weekends), and provided that other commercial activities could ensue only if social distancing could be guaranteed (one meter distance between the customers). Further, civil and religious ceremonies (including funerals), as well as all organised events and events held in private or public places (including those of a cultural, sporting, religious and recreational nature) were suspended.
- On 9 March, [a new PCM decree](#) extended the above lockdown measures to the entire national territory, subjecting the totality of the Italian population (approx. 60 million people) to the measures until 3 April.

COVID-19 owing to the concurrent exercise of national and regional emergency powers, *see* Marta Simoncini, ‘The Need for Clear Competences in Times of Crisis: Clashes in the Coordination of Emergency Powers in Italy’ (9 April 2020) [Verfassungsblog](#).

<sup>143</sup> *ibid.*, art. 1.

<sup>144</sup> In the meantime, this decree has been converted into law no. 13/2020 by Parliament.

<sup>145</sup> *ibid.*

<sup>146</sup> *ibid.*

- On 11 March, [another PCM decree](#) tightened the nationwide lockdown, ordering the closing of all commercial and retail businesses except for those providing essentials (e.g. supermarkets, grocery shops and pharmacies).
- On 22 March – as the number of new cases and deaths was increasing – [a new PCM decree](#) introduced additional movement restrictions within the nationwide lockdown and suspended all industrial and commercial production activities, with the exception of public utilities and essential services, including those identified as essential (e.g. banking, insurance, postal and public transport services, food supply chains, and the pharmaceutical and healthcare equipment industry). The latter measure was negotiated with, and strongly asked for, by multiple institutions, including trade unions and associations, regional presidents, mayors and medical professionals.
- On 25 March, [a new PCM decree](#) replaced Decree no. 6 of 23 February (and the related law that had been passed in the meantime by the Parliament). The decree amended and explicated the list of containment measures that had been worded in more abstract terms in the previous instrument.<sup>147</sup> More importantly, the decree clarified that government measures, as well as those enacted by regional and local authorities, had to comply with certain requirements including those of the temporality of limitations, adequacy and proportionality (otherwise the measures were to be ineffective). Finally, the decree imposed higher fines for the violation of the restrictive measures.
- On 1 April, a PCM decree extended the period of the lockdown measures prescribed in the [PCM decrees](#) of 8, 9, 11 and 22 March until 13 April and, subsequently, [another PCM decree](#) of 10 April gave them effect until 3 May.
- Lastly, on 26 April [a PCM decree](#) outlined the transition to the so-called “phase 2” of the government’s response to the crisis, i.e. the gradual easing of the lockdown restrictions starting 4 May. According to the decree the prohibition of movements across regions will remain at place, while movements between municipalities would be permitted only for work and health reasons, or for visits to relatives. Further, the decree provided for the re-opening of construction sites and manufacturing industries, but extended the closure of schools, restaurants and bars.

In sum, as of 26 April 2020 the following government measures have been adopted in response to COVID-19: the free movement of people is limited to exceptional circumstances of necessity, health reasons and demonstrated work-related exigencies, while public gatherings are forbidden; people not staying at home and being outside can be checked by law enforcement officials, and be asked to justify how their not staying at home falls within one of the prescribed exceptions; all business activity is suspended, except for that linked to essential goods (e.g. medicines, food and their supply chains) and financial, insurance and banking services; restaurants, bars, cinemas, theatres, museums, gyms and the like are shut down; schools and universities are closed (although distance learning has been implemented); sport and cultural events, as well as civil or religious ceremonies - including funerals - have been suspended;

<sup>147</sup> For a discussion on the problems surrounding Decree no. 6 and how they were addressed with the 25 March PCM decree, see Julinda Beqiraj, ‘Italy’s Coronavirus Legislative Response: Adjusting Along the Way’ (8 April 2020) [Verfassungsblog](#).

places of worship can be open to public only if social distancing can be exercised; and prison visits at detention centres have been suspended. Violating any of these measures is punishable by fine.

## **II. Compatibility of the measures with human rights standards**

The measures outlined above evidently entail strict limitations on the enjoyment of several civil rights and freedoms<sup>148</sup>, including: the freedom of movement; the freedom of assembly; the right to respect for private and family life; the freedom to manifest one's religion or belief/to celebrate collective religious rites; and the freedom of carrying out private economic enterprises. Inevitably, this poses the question of the compatibility of these measures with the Italian Constitution and the obligations of Italy under international human rights law, particularly the ECHR and the ICCPR.<sup>149</sup>

Under Article 32 of the Italian Constitution, health is guaranteed as a fundamental individual right as well as a collective interest.<sup>150</sup> During the COVID-19 crisis, it has been argued that the measures taken by the government for the protection of public health are in fulfilment of its obligations under the Constitution (as well as under Article 12.2(c) of the ICESCR). Nonetheless, as these measures also severely restrict a number of civil rights as the ones enumerated above, a balancing exercise is necessitated. The Constitution offers some useful guidance on striking a balance between the right to health and the restricted rights. Public health and security are expressly mentioned therein as grounds that can justify limitations on other constitutionally guaranteed rights, such as the right to free movement and residence (Article 16) and the right to assembly (Article 17). Indicatively, under Article 16 of the Constitution every citizen has the right to travel freely in any part of the country, "except for such general limitations as may be established by law for reasons of health or security". Such limitations can only be introduced by a law of the Parliament or by equivalent acts by the Government, such as the decree-laws enacted in the case at hand.

Similarly, under the ICCPR and the ECHR, limitations on (non-absolute) rights are permitted when they are prescribed by law, pursue a legitimate aim, and are necessary in a democratic society and proportionate to the identified legitimate aim. Such limitations allow for the balancing of individual and collective interests and are included in many provisions of both treaties, as well as in the Protocols to the ECHR. Concerning the freedom of movement (Article 12 ICCPR; Article 2 ECHR Protocol no. 4), the freedom of assembly and association (Articles

<sup>148</sup> This is not to deny that the COVID-19 crisis and the regulatory measures taken in Italy in response to it have also had an impact on socioeconomic rights. In this respect, the PCM Decree no. 18 of 17 March which prescribed extensive economic support measures and measures aimed at strengthening the public health system is of particular relevance. For a general discussion on socioeconomic rights and COVID-19 from a legal perspective, see [EJIL:Talk!](#).

<sup>149</sup> See also Art. 10 of the Italian Constitution, which states that the Italian legal system conforms to the generally recognised principles of international law.

<sup>150</sup> The first paragraph of Article 32 reads: "The Republic safeguards health as a fundamental right of the individual and as a collective interest, and guarantees free medical care to the indigent". For an elaboration of the normative content of the right, also through the Italian Constitutional Court jurisprudence, see [here](#) [in Italian].

21-22 ICCPR; Article 11 ECHR), the right to manifest one's religion or belief (Article 18 ICCPR; Article 9 ECHR), and the right to respect for private and family life (Art. 8 ECHR), factors like public health and safety are mentioned – though in slightly different terms – as legitimate aims and, thus, as grounds for limitations on these rights introduced by law and when necessary and proportionate to these aims. At this point it should be noted that both Decree no. 6 of 23 February and the PCM decree of 25 March are clearly anchored to the principles of necessity and proportionality, since they mention that the types of measures prescribed therein may only be adopted in compliance with the principles of adequacy and proportionality as matched to the actual risk present in the State or parts of it. To this aim, a technical and scientific committee has been set up to advise the Government on technical aspects related to the assessment of the adequacy and proportionality of the measures. Also, it must be borne in mind that the WHO has pronounced that such measures are the “only [emphasis mine] .... currently proven to interrupt or minimize transmission” of the virus. Lastly, the position that the measures were necessary and proportional is reinforced by the fact that they were taken for a definite time; indeed, their *temporary nature* was clearly indicated in the CM declaration of the state of emergency on 31 January that set a 6-month time limit, while the ensuing decree-laws were enacted for even shorter periods of maximum one month.

Against this background, the measures adopted by the Italian government seem to be in compliance with the Italian Constitution as well as with the ICCPR and the ECHR: they have been adopted by law, with the legitimate aim of protecting public health, and are both necessary and proportionate.

Another question concerns whether additional restrictions on the enjoyment of these rights could take place through derogations instead of limitations. In this regard, the emergency clauses included in Article 4 ICCPR and Article 15 ECHR would be of relevance, even if they were not specifically foreseen to apply to pandemics. Both Articles allow for derogations to some State obligations in times of public emergency threatening the life of a nation (mentioning though that certain rights are non-derogable), but only to the extent that these derogations are “strictly required by the exigencies of the situation and provided that they are consistent with the State’s other obligations under international law” and done in accordance with the procedure set out in the relevant treaty provisions (it is worth mentioning that the measures adopted so far by the Italian government have been indeed strictly limited – materially, temporally and, initially, also geographically – to the exigencies of the public health crisis). Importantly, HRC has pronounced that States purporting to invoke the right to derogate from the ICCPR must be able to justify that a given situation poses a threat to the life of the nation and that all measures are strictly required by the exigencies of the situation, as well as that “the possibility of restricting certain Covenant rights under the terms of, for instance, *freedom of movement* (art. 12) or *freedom of assembly* (art. 21) is generally sufficient during such situations and no derogation from the provisions in question would be justified by the exigencies of the situation.”<sup>151</sup> Although the Committee did not expressly mention pandemics, the above would

<sup>151</sup> See also HRC General Comment 29, para. 5.

arguably be applicable if the Italian government decides to take further containment measures by derogating from some of its obligations under human rights law.<sup>152</sup>

### III. Concluding remarks

Even though the above analysis suggests that the measures taken by the Italian government in response to COVID-19 are so far in compliance with national and international human rights law, it is clear that the pandemic and the regulatory action relating to it still poses many challenges to human rights protection. An important question in this regard concerns the possible differential impact of the measures; as it has been the case in many other countries, also here it has been alluded that the most vulnerable and disenfranchised parts of the Italian society – such as [migrants, refugees and asylum seekers](#),<sup>153</sup> [prisoners](#),<sup>154</sup> and [women](#)<sup>155</sup> have been impacted more severely by the Italian government’s response to the crisis. Therefore, it is essential that the measures and their implementation by the various state agencies should be constantly monitored for their human rights impact and conformity with human rights standards.

Another important issue relates to the adherence of the Italian government’s regulatory action to general rule of law (ROL) standards. Indeed, ROL safeguards such as those detailed in the [Venice Commission List of the Council of Europe](#) (e.g. legality and access to justice) are of great significance in the context of any emergency legislation and the use of emergency executive powers. A first assessment of the Italian government’s response to the COVID-19 crisis shows that these safeguards have been largely respected.<sup>156</sup> For instance, the publication of the decrees on the Official Journal and on the website of the Government, as well as their notification to the Parliament, ensured the publicity of the adopted measures.<sup>157</sup> Further, a reporting obligation before the Parliament every fifteen days was introduced.<sup>158</sup> Despite some initial criticisms about the abstract drafting of the list of potential measures in the Decree No. 6 of 23 February and the inclusion therein of the open-ended residual clause authorizing the PCM to adopt “any … measures adequate and proportionate to the evolution of the epidemiological situation”, the subsequent decree-law of 25 March successfully addressed

<sup>152</sup> Further guidance in this respect can be sought in the 1984 [Siracusa Principles](#). A combined reading of HRC General Comment 29 and the Principles suggest the following yardsticks in assessing the permissibility of restricting measures in state of emergency situations: their temporary nature; strict necessity and proportionality; their non-discriminatory enforcement; and the requirement that measures do not affect core rights (e.g. the right to life or the principle *nullum crimen sine lege*).

<sup>153</sup> Apart from the augmented impact of the Italian government regulatory measures on migrants, refugees and asylum seekers, another development is worth mentioning. On 7 April, the Italian government issued an [executive \(inter-ministerial\) decree](#) declaring Italy’s ports unsafe due to the COVID-19-pandemic and closing its borders for sea-rescue ships until 31 July. For a discussion on this measure, see Vera Magali Keller, Florian Schöler, and Marco Goldoni, ‘Not a Safe Place?: Italy’s Decision to Declare Its Ports Unsafe under International Maritime Law’ (14 April 2020) [Verfassungsblog](#).

<sup>154</sup> This becomes evident given that social distancing for health safety is difficult to apply in the often overcrowded Italian prisons due to space constraints. Also of relevance here is the suspension of in-person visits.

<sup>155</sup> Regarding the rise in domestic violence in Italy during the lockdown.

<sup>156</sup> See more extensively Beqiraj (n 147).

<sup>157</sup> See Decree-law of 25 March.

<sup>158</sup> Id.

these deficiencies by prescribing a closed list of the types of government measures that could be enacted, and by specifying further their scope and content. Importantly, this decree also rectified the lack of some constitutional law safeguards in the instruments before it.<sup>159</sup> Another positive element is that the Italian Parliament was communicated and transposed into law almost the entirety of the decrees within sixty days of their publication in accordance with Article 77 of the Italian constitution, while it continued its general legislative function (though adopted to the circumstances). A flawed aspect, however, concerns the impaired possibility of judicial review of the measures; the functionality of courts and the relevant legal deadlines has been suspended until 11 May, with courts remaining open only for urgent matters such as arrests or payment injunctions which can be filled electronically. It is therefore essential that judicial activity is resumed soon to ensure compliance with ROL standards during the emergency.

#### **IV. Summary Evaluation**

<b>Best Practices</b>
<ul style="list-style-type: none"> <li>• Function of the Parliament was not suspended – democratic deliberation continued satisfactorily given the circumstances</li> <li>• The emergency decree-laws adopted by the Government were introduced to the Parliament and transposed into law by it within 60 days from their adoption, in conformity with Article 77 of the Italian Constitution (i.e. the legal basis on which they were enacted)</li> <li>• Measures adopted have been largely in compliance with the human rights provisions of the Italian Constitution, as well as with those of the ECHR and the ICCPR; necessity and proportionality have been largely satisfied</li> <li>• Temporality of the state of emergency and the emergency measures has been observed so far</li> <li>• Gradual lifting of the measures is occurring in line with changing data</li> <li>• The Italian Government has taken some considerable steps to strengthen the public healthcare system and mitigate the economic effects of the crisis and the containment measures</li> </ul>
<b>Concerns</b>
<ul style="list-style-type: none"> <li>• Impaired possibility for judicial review of the measures: the function of courts and the relevant legal deadlines have been suspended until 11 May, with courts remaining open only for urgent matters such as arrests or payment injunctions which can be filled electronically. It is essential that judicial activity is resumed soon to ensure compliance with ROL and HR standards during the emergency</li> <li>• Differential impact of the measures on certain groups <ul style="list-style-type: none"> <li>○ For prisoners, social-distancing is difficult to observe due to space constraints in the overcrowded Italian prisons; same applies to migrants, refugees and asylum seekers who are still held in crowded detention centres</li> </ul> </li> </ul>

<sup>159</sup> Id.

- The Italian government's decision to declare Italian ports unsafe for the disembarkation of people rescued from boats flying a foreign flag due to, and for the duration of, the public health emergency is alarming
  - documented increase of domestic violence against women during the lockdown.
- Concerns about current and, especially, future impact of the economic consequences of the measures on the enjoyment of socioeconomic rights

# **NEW ZEALAND**

*Lisa Hsin*

## **I. Constitutional Framework**

The New Zealand constitution is to be found in formal legal documents, in decisions of the courts, and in practices (some of which are described as conventions). It reflects and establishes that New Zealand is a constitutional monarchy, that it has a parliamentary system of government, and that it is a democracy. It increasingly reflects the fact that the Treaty of Waitangi is regarded as a founding document of government in New Zealand.<sup>160</sup>

The Constitution Act 1986 is the principal formal statement of New Zealand's constitutional arrangements. The Queen or Governor-General appoints and dismisses members of the Executive Council and Ministers of the Crown. Those powers are part of the common law. Statutes can limit or even supersede these prerogative powers. New Zealand statutes which forms part of its constitutional framework include, the State Sector Act 1988, the Electoral Act 1993, the Senior Courts Act 2016, and the District Court Act 2016, which relation to the three branches of government, as well as the Ombudsmen Act 1975, the Official Information Act 1982, the Public Finance Act 1989 and the New Zealand Bill of Rights Act 1990.<sup>161</sup>

The New Zealand Bill of Rights Act 1990 applies to acts done (a) by the legislative, executive, or judicial branches of the Government of New Zealand; or (b) by any person or body in the performance of any public function, power, or duty conferred or imposed on that person or body by or pursuant to law. The rights protected are specified in the Act, including, the right not to be subjected to medical or scientific experimentation, the right to refuse to undergo medical treatment, freedom of association, and freedom of movement.<sup>162</sup>

## **II. Overview of key provisions**

There are significant legal powers at the New Zealand government's disposal. The Health Act 1956 and the Epidemic Preparedness Act 2006 are the key pieces of legislation that provide such powers to the Government. The Civil Defence Emergency Management Act 2002 also provides powers if the situation becomes more severe.

The laws available to authorities to deal with the emergency include the ability to:

- forcibly evacuate places and premises
- allow requisition of both movable and immovable property

<sup>160</sup> The Rt Hon Sir Kenneth Keith, Introduction to the Cabinet Manual 2017, '[On the Constitution of New Zealand: An Introduction to the Foundations of the Current Form of Government](#)', 2017.

<sup>161</sup> *ibid.*

<sup>162</sup> New Zealand Bill of Rights Act, 1990, section 3: Application, section 10: Right not to be subjected to medical or scientific experimentation, section 11: Right to refuse to undergo medical treatment, section 17: Freedom of association and section 18: Freedom of movement.

- gain entry onto premises
- inspect, secure, disinfect or destroy any property
- give orders to people to do or refrain from certain acts
- close roads or public places.

The Epidemic Preparedness Act 2006 becomes available if the prime minister issues an epidemic notice (*the notice*). This notice allows the government, in its truncated form of the executive branch, to change existing laws, subject to only a few safeguards of review, some civil rights and constitutional structure. The epidemic notice came into force on 25 March 2020.<sup>163</sup>

The notice activates:

- the special powers of medical officers of health under section 70 of the Health Act 1956;
- the requisition powers of medical officers of health under section 71 of that Act.

A state of national emergency under the Civil Defence Emergency Management Act 2002 has been declared. The Act expressly provides that an emergency can include a plague or an epidemic. This allows the civil defence director to coordinate the national response, which must be renewed every 7 days but has been renewed once already and is expected to be rolled over repeatedly for a significant period. The New Zealand Influenza Pandemic Plan observes that the powers in this Act would only be used in a very severe situation, and presumably when the wide-ranging powers set out in the Health Act and Epidemic Preparedness Act are insufficient to implement a response.

### **III. Role of courts**

The epidemic notice activates section 24 of the Epidemic Preparedness Act 2006, which will enable certain Judges and Associate Judges to, in particular cases, modify rules of court as they think necessary in the interests of justice to take account of the effects of COVID-19.

The Chief Justice, along with the heads of each court, have made announcements reinforcing the judiciary's role in upholding the rule of law, fair trial rights and civil liberties. For now, courts remain open but matters that will be heard are only those that '[affect] the liberty of the individual or their personal safety and wellbeing, or proceedings that are time-critical' (such as injunctions and freezing orders) where time is of the essence, but not full civil trials.<sup>164</sup> Courts have also modified their operations to remove any unnecessary physical interaction. Remote hearings are now the predominate means of hearing. At present, judges make alterations on an ad hoc basis, but the judicial Rules Committee is in the process of drafting more comprehensive amendments to better facilitate remote trials.

<sup>163</sup> Government Gazette, [Epidemic Preparedness \(COVID-19\) Notice 2020](#), 24 March 2020.

<sup>164</sup> Protocols: What courts are doing during COVID-19 alert levels, [Chief Justice Winkelmann's Preamble](#), 17 April 2020.

In recent days, two applications were made challenging the legality of the executive lockdown order (**order**) as 'detention' within the meaning of the Habeas Corpus Act 2001. The two virtually identical applications were made against the Prime Minister and the Director-General of Health of New Zealand.<sup>165</sup> The High Court was asked to determine (1) if the order constitutes 'detention' and (2) whether the detention was legal. The applicants, seeking release from 'detention', argued (among other things) that the order constituted a gross breach of the human rights and fundamental inalienable freedoms of all New Zealanders as conferred by the NZ Bill of Rights Act 1990. Justice Peters found the order did not constitute detention because the applicants remain free to engage in many of their usual activities, which is quite different from being 'held in close custody'. The Court was also satisfied that the order is lawful. He reasoned that orders made under section 70(1) can be very broad, and the Act was intended to give the medical officer of health the broadest possible powers to respond to an outbreak. The Court refused to consider the argument concerning human rights, as the appropriate procedure for it would be an application for judicial review. Both applications were dismissed on the grounds that the applicants were not detained within the meaning of the Habeas Corpus Act 2001 and even if they are, the detention is lawful under section 70(1) of the Health Act 1956.

#### **IV. Democratic accountability mechanisms**

Most significantly, an Epidemic Response committee was established to scrutinise the government's action in lieu of the House's usual accountability mechanisms. The select committee meets by Zoom (broadcast publicly), is chaired by the leader of the opposition and has an opposition majority amongst its 11 members. It is charged with plenary powers to inquire into the government's response to Covid-19; it has already questioned key ministers and officials, as well as hearing from experts.

However, some commentators have expressed concerns that the establishment of a committee is not an adequate substitute for the usual democratic process, with its usual checks and balances. For instance, it does not have its full powers to scrutinise urgent government regulations, and it lacks any powers to recall Parliament if it thinks it necessary. The government's actions must be subject to scrutiny and monitoring that Parliament would normally provide.<sup>166</sup>

#### **V. Liability and compensation**

The protection from liability is wide but retains the right to initiate actions in tort (gross negligence or bad faith).

The Civil Defence Emergency Management Act 2002 provides that where compensation is specified (for property requisitioned, for loss or damage to personal property) there is no cause

<sup>165</sup> *A v Arden* [2020] NZHC 796; *B v Arden* [2020] NZHC 814.

<sup>166</sup> Bryce Edwards, 'New Zealand's Covid-19 strategy looks successful, but we must safeguard democracy' (15 April 2020) [The Guardian](#).

of action against the Crown, or a Civil Defence Emergency Management Group, or an officer or employee or member of any of them, or against any other person, to recover damages for any loss or damage that is due directly or indirectly to a state of emergency or a transition period, so long as the act or omission occurred in the exercise or performance of his or her functions, duties, or powers under this Act.

## **VI. Enforcement and expiration**

Refusal to comply with the Prime Minister's executive orders during this 'emergency' may result in up to three months in jail, and/or NZ\$5,000 (Approx. GB£2,400) fine for an individual or NZ\$50,000 (approx. GB£24,200) for a corporate. A brief review of media reports suggest the New Zealand police has so far recorded nearly 300 people in breach of lockdown rules – most have been sent home with a warning. There are no reports to suggest overreach in use of lockdown powers.

Under section 5(3) of the Epidemic Preparedness Act 2006, the notice expires on the day that is **3 months** after its commencement, unless—

- an earlier expiry date is notified; or
- the notice is renewed under section 7 of that Act.

## **VII. Concerns**

Beyond the few hard rules set out above, much of the force of the lockdown has come from the Prime Minister's guidance on acceptable behaviour during this crisis. Prime Minister Jacinda Ardern has been repeatedly urged the public to stay in their 'bubbles', whilst encouraging the public to 'be kind and stay strong'. In doing so, she has generated strong social norms of behaviour. Apparently, 4,000 complaints were lodged within the first 24 hours by members of the public. There are dangers that this could lead to some people covertly supervising the activities of other citizens.<sup>167</sup>

However, there are some concerns that the loose 'layering' approach of New Zealand's lockdown regime and the executive orders to date, which constitutes a regime which is largely not written in law. This could compromise the requirement in the Bill of Rights Act that limits rights be prescribed by 'law', perhaps affecting the justifiability of the lockdown in human rights terms.<sup>168</sup> This could have the potential of limiting legal action against the government to civil claims in tort, which is not an adequate substitute for claims for breach of human rights.

<sup>167</sup> Vera Alves, 'COVID-19 Coronavirus: why we should be mindful about dobbing our neighbours in' New Zealand Herald, 31 March 2020, <[https://www.nzherald.co.nz/nz/news/article.cfm?c\\_id=1&objectid=12321036](https://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=12321036)>

<sup>168</sup> Dean Knight, Lockdown Bubbles through Layers of Law, Discretion and Nudges – New Zealand, 7 April 2020, <<https://verfassungsblog.de/covid-19-in-new-zealand-lockdown-bubbles-through-layers-of-law-discretion-and-nudges/>>

New Zealand's COVID-19 lockdown regime is built on pre-existing mechanisms and supported by strong public messaging from the Prime Minister in the form of a national plan with four-level alert system.<sup>169</sup> The unwritten and patchwork-like formulation of New Zealand's lockdown regime is not without problems, but the New Zealand government's approach appears to be working so far, a recent poll shows that 88% of the public trust that the government is making the right decisions. This figure compares well with the other countries – the average poll rating for G7 countries is only 59%. It may be that the pragmatism of the Government's response is the result of a rapidly changing and fast-moving situation. It is worth keeping an eye on the situation, to ensure that specific enactments and accountability mechanisms are put in place as the country moves forward.

### **VIII. Summary Evaluation**

<b>Best Practices</b>
<ul style="list-style-type: none"><li>• An Epidemic Response committee was established to scrutinise the Government's action in lieu of the House's usual accountability mechanisms. The select committee meets by Zoom (and broadcasts these meetings publicly)</li><li>• Courts remain open for matters that '[affect] the liberty of the individual or their personal safety and wellbeing, or proceedings that are time-critical' facilitating access to justice</li><li>• Lockdown regime is built on pre-existing mechanisms and supported by a national plan consisting of a four-level alert system enabling foreseeability and transparency</li></ul>
<b>Concerns</b>
<ul style="list-style-type: none"><li>• An executive minded response consisting of unwritten executive orders can create confusion and compromise the requirement in the Bill of Rights Act 1990 that limits rights be prescribed by 'law'</li><li>• Epidemic Response committee does not have its full powers to scrutinise urgent government regulations, and it lacks any powers to recall Parliament if it thinks it necessary</li><li>• There is a risk of invasion of privacy among citizens as some people have taken to covertly supervising the activities of other citizens (reporting their neighbours, for instance)</li></ul>

<sup>169</sup> COVID-19 Alert System, <<https://covid19.govt.nz/alert-system/covid-19-alert-system/>>.

# **RUSSIAN FEDERATION**

*Dr Ekaterina Aristova*

The situation concerning the spread of COVID-19 in Russia has been evolving fast. The first coronavirus cases were confirmed in January 2020.<sup>170</sup> Since then, Russian authorities have enforced a range of measures to stop the rapid spread of the virus. The Russian response to the coronavirus crisis has been defined by two distinctive features: (1) the gradual tightening of restrictions for the public aimed at reducing social contact; and (2) the referral of powers to implement containment measures from the federal to the regional level, as well as the overall regional lead in fighting the COVID-19 outbreak. According to the Constitution of Russia dated 12 December 1993 (“Constitution”), Russia consists of 85 equal federal subjects which will be referred to as the “Regions” in this report.<sup>171</sup> As of 19 April 2020, Russia had reported 47,121 coronavirus cases and 405 deaths. Most of the Regions have enforced mandatory lockdowns, together with unprecedented restrictions on movement for their residents. This report briefly summarises key tensions and contradictions surrounding the enforcement of the strict lockdown in Russia and the corresponding human rights concerns.

## **I. Overview of the containment measures implemented in Russia as of 19 April 2020**

On 5 March, the Mayor of Moscow Sergey Sobyanin announced a ‘high alert regime’ to prevent the spread of COVID-19 (“High Alert Regime Decree”).<sup>172</sup> The High Alert Regime Decree was issued in accordance with Federal Law No. 68-FZ “On Protection of the Population and Territories against Emergency Situations of Natural and Technogenic Nature” dated 21 December 1994 (“Federal Law on Natural Disasters”). Among other measures, the High Alert Regime Decree set a requirement for Russian citizens returning from China, South Korea, Iran, France, Germany, Italy and Spain to self-isolate for 14 days. Within the next two weeks, the High Alert Regime Decree was amended several times to incrementally introduce additional restrictive measures in order to maintain social distancing such as further expansion of the quarantine requirements, closure of schools and cancellation of all sporting and cultural events and almost all large gatherings.

By 19 March, high alert regimes had been announced in all 85 Regions. Regional authorities have followed Moscow’s lead in imposing various measures in response to the COVID-19 outbreak.

<sup>170</sup> BBC news dated 31 January 2020.

<sup>171</sup> Every Region has its own executive head, a parliament and legislation. The Constitution defines the limits of the jurisdiction and powers of Russia and the joint jurisdiction of Russia and the Regions. Outside these limits, the Regions enjoy full state power.

<sup>172</sup> Decree of the Mayor of Moscow No. 12-UM “On the introduction of high alert regime” dated 5 March 2020. Moscow and St Petersburg are the only two cities of the federal significance with a status of the Region under the Constitution.

On 23 March, the High Alert Regime Decree was amended to order senior citizens over 65 years of age and those with chronic diseases to follow a ‘self-isolation regime’ and remain at home until at least 14 April. By 26 March, the Mayor of Moscow had ordered the closure of cafes, restaurants, shops selling non-essential goods and organisations providing non-essential services such as beauty salons.

On 25 March, President Vladimir Putin for the first time addressed the nation on the pandemic situation in a televised broadcast. He announced fully paid ‘non-working days’ in Russia from 30 March to 3 April in order to encourage Russian citizens to stay at home and decrease the spread of coronavirus.<sup>173</sup> Certain companies were permitted to run ‘business as usual’, such as food suppliers, banks and medical organisations. In addition, a nationwide vote on constitutional amendments allowing President Putin to stay in the presidency beyond 2024 was postponed. A limited number of social support measures such as deferring tax and loan repayments for the next six months was also announced. President Putin has refrained from introducing any stringent measures to enforce social distancing. Subsequently, as widely reported by the media, many Russians have interpreted the ‘non-working days’ as a nationwide holiday and decided to take advantage of the warm weather by heading to the parks and travelling to internal seaside resorts.<sup>174</sup>

On 29 March, the Mayor of Moscow again amended the High Alert Regime Decree to introduce a mandatory lockdown with a strict stay-at-home policy (“Mandatory Lockdown Amendment”). All Muscovites irrespective of their age were ordered to self-isolate in their places of living and allowed to leave homes for one of the following reasons: travelling to work for key workers of essential businesses; medical emergency; buying groceries and other essential goods; walking pets within 100m of home; and disposing rubbish. There is no exemption for exercise. These restrictions do not apply to the holders of special passes issued in accordance with the procedure set out by the Government of Moscow. The Mandatory Lockdown Amendment has enforced tough restrictions on the movement of Moscow residents, and – perhaps unsurprisingly – its legitimacy provoked heated debate.<sup>175</sup>

On 30 March, Prime Minister Mikhail Mishustin called on the Regions to mirror the move made by the Mayor of Moscow. In addition, Russian borders have been temporarily closed though with the exception of permitting some repatriation flights. Within the next few days, most of the Regions enforced a stringent stay-at-home policy by introducing so-called ‘compulsory self-isolation regimes’ similar to the Mandatory Lockdown Amendment.<sup>176</sup> A limited number of Regions have implemented different measures ordering, for instance, self-isolation for senior citizens only.<sup>177</sup> The Republic of Chechnya was one of the first Regions to

<sup>173</sup> Decree of the President of the Russian Federation No. 206 “On the announcement of non-working days in the Russian Federation” dated 28 March 2020.

<sup>174</sup> See, for instance, media reports [here](#) and [here](#).

<sup>175</sup> See [here](#), [here](#) and [here](#).

<sup>176</sup> Similar to Moscow, these measures have been introduced by the heads of the executive branch having different titles (Governors, Presidents of the Republics, etc).

<sup>177</sup> A useful tracker of the regional responses to the COVID-19 outbreak is maintained by Riga-based Internet portal [Meduza](#).

announce closure of its internal borders. On 6 April, Prime Minister Mishustin declared that the closure of the internal borders by the Regions was “unacceptable” and beyond the scope of their powers.<sup>178</sup>

On 1 April, President Putin signed legislation *inter alia* (i) expanding powers of the Government of Russia and clarifying powers of the Regions under the Federal Law on Natural Disasters; (ii) tightening penalties for breaking quarantine and/or self-isolation requirements; (iii) toughening liability for spreading fake news about COVID-19 outbreak (“Emergency Law”).<sup>179</sup> The Emergency Law sought to address some of the criticism of the constitutional limits of the Mandatory Lockdown Amendment and similar measures enacted in other Regions outside of Moscow.

On 2 April, President Putin addressed the nation again, announcing an extension of the paid ‘non-working’ days till 30 April. No state of emergency was declared at the federal level. Instead, the decision-making powers on the necessary measures for preventing spread of the coronavirus disease were left to the Regions given the regional differences in infection rates. No additional financial support was announced either for businesses or self-employed people. On 15 April, the Mayor of Moscow launched a digital permit system to control residents’ movements under the High Alert Regime Decree. The system applies to people needing to use a car or public transport for any work-related and personal reasons. No permit is required for travel by foot.

## II. Human rights framework in Russia

The Constitution proclaims the rule of law in Russia guarantees fundamental rights and freedoms according to the universally recognised principles and norms of international law. Russia has ratified 11 out of the 18 international human rights treaties listed on the website of the United Nations Office of the High Commissioner for Human Rights, including the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.<sup>180</sup> In addition, Russia is also a party to the European Convention on Human Rights.

Article 15 of the Constitution proclaims that universally recognised principles and norms of international law and Russia’s international treaties are an integral part of the legal system and have primacy over national law in the event of any inconsistency. Moreover, the Russian Constitutional Court in July 2015 declared that the practical implementation of the decisions of the European Court of Human Rights (“ECtHR”) is only possible through recognition of the supremacy of the Constitution.<sup>181</sup> It was further resolved that if a ECtHR decision is

<sup>178</sup> [RBC news](#) dated 6 April 2020.

<sup>179</sup> Amnesty International Public Statement, [Russian Federation: “Fake news” bill prompted by COVID-19 threatens freedom of expression](#), EUR 46/2093/2020 , 3 April 2020.

<sup>180</sup> For further details, see [website](#) of the UN Office of the High Commissioner for Human Rights.

<sup>181</sup> Resolution of the Russian Constitutional Court No. 21-P dated 14 July 2015.

incompatible with the Constitution, it is not to be implemented.<sup>182</sup> Following this ruling, a law came into force at the end of 2015 giving the Russian Constitutional Court powers to decide whether it is possible to enforce a resolution of an intergovernmental body for the protection of human rights and freedoms.<sup>183</sup>

### **III. Right to health and access to healthcare in Russia**

Article 41 of the Constitution guarantees everyone the right to health and free healthcare. The public healthcare system is provided by the state through the Federal Compulsory Medical Insurance Fund and is overseen by the Ministry of Healthcare. The Regions also have their own system of healthcare authorities. There is, however, a significant difference between the medical infrastructure across the Regions, especially when comparing Moscow with provincial and rural Russia. In recent years, the public healthcare system has been much criticised for its inefficiency and low quality of services “*due to a continued lack of funds, medical and technical equipment and supplies, and, finally, to the ineffective organization of health care delivery services*”.<sup>184</sup> Since 2011, for instance, Moscow has cut nearly 2,200 infectious disease beds.<sup>185</sup> In 2016, a Bloomberg report ranked the Russian healthcare system last out of 55 developed nations assessing life expectancy, health-care spending per capita and relative spending as a share of gross domestic product.<sup>186</sup> In October 2019, members of the Russian medical association published an open letter addressed *inter alia* to President Putin, the Government and the Heads of the Regions suggesting that the public healthcare system is in a severe and systemic crisis and calling for immediate reforms.<sup>187</sup> Consequently, there is a “*a gap between the declared and actual possibility of obtaining all necessary medical help on a free-of-charge basis*”.<sup>188</sup>

The COVID-19 outbreak has inevitably raised problems for the Russian healthcare system similar to the challenges faced by the other countries around the world such as lack of the PPE for the health workers, shortage of hospital beds and artificial lung ventilation equipment. The Russian army was mobilised to build temporary hospitals to treat coronavirus patients.<sup>189</sup> The Government announced that over RUB 45 billion (approximately GBP 487 million) will be distributed to the Regions to cover incentive payments for healthcare workers treating the coronavirus patients and another RUB 640 million (approximately GBP 6.9 million) for medical and technical supplies.<sup>190</sup> Russia’s consumer protection watchdog Rospotrebnadzor

<sup>182</sup> Commentators alleged that review of Article 15 of the Constitution was initiated as a response to the ECtHR decision in *Yukos* case// Maria Smirnova, [\*Russian Constitutional Court Affirms Russian Constitution's Supremacy over ECtHR Decisions\*](#), EJIL:Talk! dated 15 July 2015.

<sup>183</sup> Federal Constitutional Law No. 7-FKZ "On amendments to the Federal Constitutional Law 'On the Constitutional Court of the Russian Federation'" dated 14 December 2015.

<sup>184</sup> Boris Rozenfeld, [\*The Crisis of Russian Health Care and Attempts at Reform\*](#).

<sup>185</sup> Investigation article by [\*Vedomosti\*](#) dated 9 April 2020.

<sup>186</sup> A brief summary of the report is available [here](#).

<sup>187</sup> The text is available [here](#).

<sup>188</sup> [\*Healthcare Law Review: Russia\*](#) by Lola Shamirzayeva published in September 2019.

<sup>189</sup> [\*Daily Mail Online\*](#) as of 26 March 2020. See <https://www.dailymail.co.uk/news/article-8155247/Russia-building-SIXTEEN-new-coronavirus-hospitals.html> (accessed 20 April 2020).

<sup>190</sup> [\*Meeting of the Government of Russia on 16 April 2020\*](#).

has reported that as of 15 April 2020 more than 1.5 million coronavirus tests has been carried out across the country making Russia the second greatest testing country in the world.<sup>191</sup>

#### **IV. Legality of the mandatory lockdowns enacted by the Regions**

The High Alert Regime Decree and the Mandatory Lockdown Amendment subjected Moscow residents to stringent restrictions and limited - to the significant extent - rights and freedoms guaranteed by the Constitution such as the freedom of movement (Article 27), the freedom of religion including the right to collective worship (Article 28), the right to peaceful assembly (Article 31), and the right to carry out entrepreneurial and economic activities not prohibited by law (Article 34). While international law permits derogations from certain rights and freedoms in cases of emergency such as pandemic, any limitations must be provided by law, based on scientific evidence, be strictly necessary and proportionate to the objective, not be applied in a discriminatory manner, be of limited duration and subject to regular review.<sup>192</sup> In this context, several commentators have questioned the legality of the High Alert Regime Decree and the Mandatory Lockdown Amendment. It is worth of noting that the legal debate typically does not doubt the efficiency and necessity of the social distancing to contain COVID-19 and self-isolation as a crucial measure for slowing virus transmission. Rather, the main concern relates to the constitutionality of the limitations of the fundamental rights and freedoms enacted by the decree of the Mayor of Moscow. The below analysis also applies to the assessment of the legitimacy of the self-isolation measures implemented in other Regions.

The starting point of the analysis is Article 55 of the Constitution which provides that constitutional rights and freedoms may be *limited by the federal law* only to the extent necessary for the protection of the fundamental principles of the constitutional system, morality, health, the rights and lawful interests of other people, for ensuring defence of the country and security of the state (emphasis added). As a next step, Article 56 establishes that certain limitations to the rights and freedoms may be placed (i) in the circumstances of a state of emergency; (ii) in accordance with the federal constitutional law;<sup>193</sup> and (iii) specifying the scope of limitations and their timeframe. Finally, the Federal Constitutional Law No. 3-FKZ “On State of Emergency” dated 30 May 2001 (“**State of Emergency Federal Law**”) provides that a state of emergency may be introduced in the whole territory of the Russian Federation and its component parts only by a decree of the President of the Russian Federation, and lists epidemics among valid circumstances posing a direct threat to the life and security of the citizens.<sup>194</sup>

<sup>191</sup> Data is available at [Rospotrebnadzor website](#).

<sup>192</sup> Siracusa Principles on the on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, UN Doc E/CN.4/1984/4 (1984); General Comment No. 27: Article 12 (Freedom of Movement), U.N. Doc. CCPR/C/21/Rev.1/Add.9 (1999); General Comment No. 29: Article 4: Derogations during a State of Emergency, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (2001).

<sup>193</sup> Federal constitutional law is the type of federal law adopted on the issues envisaged by the Constitution.

<sup>194</sup> Article 3 of the State of Emergency Federal Law provides that state of emergency can be introduced in the presence of the “emergency ecological situations, including epidemics and epizootics *occurring as a result of accidents, hazardous natural phenomena, calamities, natural and other disasters* which entailed (which may entail) human casualties, the infliction of damage to the health of people and the environment, considerable material losses and disturbance to vital activities of the population which require the carrying out of major

So far, an important question in the debate was how to interpret the wording ‘*limited by the federal law*’ in Article 55 of the Constitution. Three different arguments have been advanced. The first claims that every derogation from constitutional rights and freedoms requires the adoption of a separate federal law. Thus, MP Andrei Klishas, who chairs the Committee on constitutional legislation and state-building of the upper chamber of the Russian Parliament, has criticised the Mayor of Moscow for exceeding his authority by enforcing a Mandatory Lockdown Amendment, and insisted that the introduction of any limitations of the constitutional rights and freedoms fall within the exclusive competence of the Russian Parliament and the President of the Russian Federation.<sup>195</sup>

Another alternative is to read Article 55 in conjunction with Article 56 providing that the State of Emergency Federal Law is an exclusive piece of federal legislation allowing limitation of the constitutional rights and freedoms solely under the President’s Decree in a state of emergency. Since President Putin has not announced a state of emergency, the Mandatory Lockdown Amendment is, according to this interpretation, illegitimate.<sup>196</sup> The argument is based on the acknowledgment that the enacted restrictions to the fundamental rights and freedoms are unprecedented and are only appropriate if introduced at the federal level during a state of emergency.

The final interpretation claims that limitations can be enforced in accordance with the procedures set out by any relevant federal law. Arguably, this is the position taken by the Mayor of Moscow who has enacted the High Alert Regime Decree and the Mandatory Lockdown Amendment relying on the Federal Law on Natural Disasters.<sup>197</sup> The latter sets out regimes applied to protect people and territories in situations of emergency of a natural and technological nature, which is defined as the “situation in certain territory developed as a result of accident, natural hazard, catastrophic crash, *spread of dangerous disease*, natural or other disaster which can entail or entailed the human victims, damage to health of people or the environment, considerable material losses and violation of conditions of life activity of people”. The emphasised wording was added to the definition by the Emergency Law.

The Federal Law on Natural Disasters provides for the existence of one of the three regimes: (i) normal activity in the absence of the threat of the emergency situation; (ii) high alert regime in the face of the threat of the emergency situation; and (iii) emergency situation to liquidate existing emergency situation. The high alert regime and the emergency situation are not equivalent to a state of emergency declared by the President of Russia in accordance with the

emergency, rescue and other urgent operations”. It is not the purpose of this report to analyse whether pandemic of COVID-19 complies with this definition.

<sup>195</sup> [RBC news](#) as of 29 March 2020. Federal laws are adopted by the Parliament and signed into law by the President.

<sup>196</sup> See, for instance, comments to this [blog](#).

<sup>197</sup> Several commentators have suggested that another relevant legislation clarifying powers of the Regions is the Federal Law No. 52-FZ “On Sanitary and Epidemiologic Welfare of the Population” dated 30 March 1999. However, the High Alert Regime Decree does not refer to this law, and – hence – its analysis is outside the scope of this report.

State of Emergency Federal Law. As of 8 April, all Regions are operating on the basis of high alert regimes implemented by the regional authorities.<sup>198</sup> Article 4.1 of the Federal Law on Natural Disasters provides that the Regions are authorised to *limit access of people and transport to the territory where the emergency situation (or the threat of it) exists* (emphasis added). Article 11 further establishes that Regions are authorised *inter alia* to organise rescue, evacuation and salvation operations; inform citizens about the emergency situations; finance efforts to protect population and territories. The Emergency Law has amended Article 11 to also allow Regions to *prescribe mandatory rules of conduct for citizens and businesses during the high alert regime or emergency situation* (emphasis added).

There are a number of concerns with reliance upon the Federal Law of Natural Disasters as an authority for the limitation of the constitutional rights and freedoms under the High Alert Regime Decree. First, at the time of the enforcement of the Mandatory Lockdown Amendment the definition of the emergency situation did not cover the spread of dangerous diseases. Consequently, until the Emergency Law closed the gap, the Federal Law of Natural Disasters was not applicable. Second, the Federal Law of Natural Disasters does not explicitly allow Regions to order their residents to self-isolate at home. In fact, there is no legal definition of the ‘compulsory self-isolation regime’ in the Russian regulatory framework. While Article 4.1 and Article 11 envisage the imposition of certain types of measures during the high alert regime, questions still arise. How does one define the territory where the ‘emergency situation (or the threat of it)’ exists? Is it the hospital where the COVID-19 patients are kept or certain areas of Moscow where most of the coronavirus cases were confirmed or the whole territory of Moscow? If the latter, how does one limit access of people and transport to Moscow? Does it require banning people from other Regions or foreign states entering Moscow or restricting Moscow residents from leaving their homes? What is the legitimate scope of the newly adopted ‘mandatory rules of conduct for citizens and businesses’? Imposing a requirement to wear masks and use sanitizers is one thing but banning people from going out to do exercise is quite another. Importantly, the Federal Law of Natural Disasters does not explicitly provide that mandatory rules of conduct implemented in the course of high alert regime or emergency situations may limit constitutional rights and freedoms.

Overall, there is a further unresolved concern that Regions lack the constitutional authority to limit freedom of movement and other fundamental rights and freedoms guaranteed by the Constitution. A great degree of legal uncertainty about the legitimate limits of the Regions’ powers (and the corresponding federal powers) is reinforced by the use of different – often legally undefined – terms (e.g. ‘high alert regime’; ‘paid non-working days’; ‘compulsory self-isolation regime’; ‘quarantine’; ‘state of emergency’; ‘emergency situation’). It is not clear the extent to which these terms are intended to be used synonymously and interchangeably. Arguably, some of the identified concerns could be resolved by the declaration of a state of emergency or emergency situation by the federal authorities in accordance with the existing legislation. However, President Putin has explicitly left to the Regions the decision-making

<sup>198</sup> No high alert regime was declared on the federal level. No emergency situation was declared either at the federal level or in any of the Regions.

powers in shaping the response to the COVID-19 outbreak.<sup>199</sup> It creates a disturbing precedent the potentially paves the way for abusive practices in the future. At this point, the Regions have been acting following explicit authorisation from President Putin, but one can imagine the consequences under the opposite scenario. In addition, what are the limits of the mandatory rules of conduct in limiting human rights? For instance, is it lawful for the Region to restrict its citizens from posting online their opinion on the spread of virus and assess the efficiency of the Region's response or restrict social interaction via mobile communication?<sup>200</sup> So far, it is an open question that remains unanswered. There is certainly room for the Russian Constitutional Court to clarify the scope of Article 55 of the Constitution and the appropriate extent of limitation of the constitutional rights and freedoms by different authorities.

## **V. Judicial review of the mandatory lockdowns in the Regions**

Measures adopted by the Mayor of Moscow under the High Alert Regime Decree as well as the mandatory lockdowns enforced in the other Regions are subject to judicial review. According to media reports, several claims challenging legitimacy of the ‘compulsory self-isolation regime’ have already been filed in the courts of general jurisdiction.<sup>201</sup> Russian courts continue to operate during the COVID-19 outbreak, albeit with important adjustments. On 8 April 2020, the Supreme Court of Russia and the Council of Judges of Russia issued a joint ruling recommending the courts to continue considering the cases of urgent nature, including those related to the protection of constitutional rights and freedoms.<sup>202</sup> How thorough the judicial review may be, remains to be seen, but the independence of the Russian judiciary and its overall effectiveness remain a serious concern.<sup>203</sup>

## **VI. Enforcement of the mandatory lockdowns in the Regions**

### **a. Administrative and criminal liability**

Simultaneously with the enactment of the Mandatory Lockdown Amendment, the Russian Parliament has toughened administrative and criminal liability for non-compliance with the measures implemented to fight COVID-19. Thus, Article 6.3 of the Russian Code of Administrative Offences dated 30 December 2001 was amended to increase the fines for breaching sanitary-hygienic rules and for non-compliance with anti-epidemic measures.<sup>204</sup> In addition, a new Article 20.6.1 was introduced to impose liability for behavioural non-compliance under the high alert regime (in other words, for breaching the mandatory rules of

<sup>199</sup> It is not the purpose of this report to assess why the President and the Government have to date refrained from invoking emergency powers including any financial obligations towards Russian citizens arising in this regard.

<sup>200</sup> For the avoidance of doubt, no such measures have been implemented in any Region.

<sup>201</sup> See, for instance, [here](#).

<sup>202</sup> English translation is available at the [website](#) of the Supreme Court of Russia..

<sup>203</sup> International Commission of Jurists, [\*Russian Federation: Independence and impartiality; Judicial integrity and accountability\*](#), 16 June 2014; Nils Muižnieks et al, [\*As long as the judicial system of the Russian Federation does not become more independent, doubts about its effectiveness remain\*](#), Council of Europe, Commissioner for Human Rights, 25 February 2016.

<sup>204</sup> A good overview of the sanctions is [provided](#) by Bryan Cave Leighton Paisner (Russia) LLP.

conduct implemented by the Regions through compulsory self-isolation discussed above). Police officers in the Regions have been relying upon these amendments to levy fines for the violation of self-isolation requirements. At the same time, the Russian Code of Administrative Offences imposes administrative liability for the violation of the rules enforced by the federal legislation. The mandatory lockdowns, as already discussed, have been enforced at the regional level. Moscow authorities have promptly amended the Moscow Code of Administrative Offences to introduce fines for the failure to comply with the High Alert Regime Decree, and also executed an agreement with the federal Interior Ministry to enable police to directly issue fines to Moscow residents. However, not every Region imposing a mandatory lockdown has followed this example. Consequently, the legality of the fines imposed in certain Regions is at least questionable.<sup>205</sup>

### **b. Use of surveillance technology**

Russian authorities have been using a range of cyber surveillance tools to enforce compliance with the containment requirements to fight COVID-19 outbreak. Different measures have been implemented depending on the nature of the restriction. As a first step, cyber surveillance has been put in place over individuals subject to quarantine orders (i.e. people returning from foreign countries and/or showing symptoms of coronavirus).<sup>206</sup> To trace their personal location and control the movement, the Ministry of Digital Development, Communications and Mass Media of Russia collects data about all individuals required to self-quarantine and transfers it to the mobile phone operators for further control. In the event of non-compliance, the individual receives a message on his phone, while cases of the continuous breach of the quarantine are reported to the police. In addition, Moscow has been using one of the world's largest networks of facial recognition cameras to keep track of individuals ordered to self-quarantine.<sup>207</sup> In Murmansk, the regional government is considering using voluntary electronic tracking bracelets to monitor the movements of coronavirus patients self-isolating at home and people suspected of having the coronavirus.<sup>208</sup> A cursory review of media reports suggests that hundreds of individuals, including those confirmed with or suspected of having the coronavirus, have been refusing to comply with the self-isolation requirements.

More importantly, certain Regions have also used a range of cyber surveillance tools to enforce self-isolation requirements for the healthy citizens. Moscow has been considering an aggressive system of methods, including mobile apps tracking users' location and credit card checks, referred to as 'Cybergulag'.<sup>209</sup> While not all of these measures have been enacted, a digital permit system was launched to control individuals travelling by car or public transport. A permit is generated in the form of a machine-readable QR code through an application online, via a text message or a call. Applicants are required to submit personal data including passport

<sup>205</sup> See discussion [here](#).

<sup>206</sup> A good overview of the surveillance measures introduced in Russia is available [here](#).

<sup>207</sup> Nicola Habersetzer, [\*Moscow Silently Expands Surveillance of Citizens\*](#), Human Rights Watch, 25 March 2020.

<sup>208</sup> Yuliya Fedorinova and Stepan Kravchenko, [\*Russian Region Plans Tracking Bracelets for Coronavirus Victims\*](#), 15 April 2020.

<sup>209</sup> The Guardian, [\*'Cybergulag': Russia looks to surveillance technology to enforce lockdown\*](#), 2 April 2020.

details. Several other Regions have also developed surveillance systems to enforce mandatory lockdowns.<sup>210</sup>

The use of surveillance technology by the Russian authorities, even if introduced in good faith, inevitably raises significant concerns for the privacy protections guaranteed by Article 23 of the Constitution. The use of such technology could be only justified if sufficient procedural safeguards and specification requirements are enacted, including diligent protection of the collected data, appropriate oversight of law enforcement authorities over the use of the data, proportionality and limited duration of the adopted measures, and transparency about data collection, analysis, storage and removal. A search of the websites of the [Ministry of Digital Development, Communications and Mass Media of Russia](#) and the [Mayor of Moscow](#) suggests that neither have provided any details of the accountability mechanisms in place and it is therefore not possible to assess whether the necessary safeguards have been put in place. There have been worrying reports in the media about leaks of personal data of individuals subject to self-isolation requirements and their subsequent bullying.<sup>211</sup> There is also a real risk that the use of surveillance technology will seep into the regulatory framework after COVID-19 since there are already examples of alarming state control over mobile operators. In August 2019, for example, the Russian authorities allegedly mandated the shutdown of all mobile internet in Moscow to restrict communications during mass protests against President Vladimir Putin.<sup>212</sup>

### c. Anti-fake news legislation

As already mentioned above, the Russian Parliament has enacted Emergency Bill *inter alia* imposing administrative and criminal liability for spreading fake news about coronavirus. The focus of the law is on disinformation and is aimed at preventing the spread of false data in public domain. While freedom of speech is guaranteed in Article 29 of the Constitution, Russian authorities have adopted oppressive press censorship in recent years. In 2019, the Russian Parliament passed two laws banning ‘disrespect’ of the state and its officials and the creation and dissemination of the fake news.<sup>213</sup> The laws were enacted despite strong criticism on the adverse impact that they would have on freedom of speech in Russia.<sup>214</sup> Amnesty International published a statement suggesting that the Emergency Bill “*will be used to further curtail the right to freedom of expression and silence criticism of the authorities*”.<sup>215</sup> The new provisions will remain part of the Russian legal system even when the pandemic is over and could conceivably be used against opponents who challenge the response of the Russian authorities to COVID-19 outbreak.

<sup>210</sup> For instance, Republic of Tatarstan has introduced a text-message pass system to allow residents to leave home during the lockdowns// The Moscow Times, [Moscow to Enforce Virus Quarantine With QR Codes, Smartphone App](#), 1 April 2020.

<sup>211</sup> See [article](#) by Meduza.

<sup>212</sup> Zak Doffman, [Russian Authorities 'Secretly' Shut Down Moscow's Mobile Internet: Report](#), 8 August 2019.

<sup>213</sup> BBC news, [Russia laws ban 'disrespect' of government and 'fake news'](#), 7 March 2019.

<sup>214</sup> See references [here](#).

<sup>215</sup> Amnesty International Public Statement, Russian Federation: “Fake news” bill prompted by COVID-19 threatens freedom of expression, EUR 46/2093/2020 , 3 April.

## VII. Summary Evaluation

Best Practices
<ul style="list-style-type: none"><li>Courts remain open and judicial review of the cases related to the protection of constitutional rights and freedoms is regarded as urgent by the Supreme Court of Russia and the Council of Judges of Russia</li><li>Regular online discussions between federal and regional authorities on the status of the coronavirus outbreak across the country and implemented measures with TV broadcast announcements</li></ul>
Concerns
<ul style="list-style-type: none"><li>The federal regions of Russia may have exceeded their constitutional authority in limiting fundamental rights and freedoms while implementing lockdown measures.</li><li>Russia is using cyber surveillance tools to enforce compliance with the mandatory lockdowns in several regions and there is a concerning lack of transparency about institutional safeguards in place</li><li>Russian Parliament has toughened administrative liability for non-compliance with the lockdown measures implemented to fight the coronavirus, but the legality of the fines enforced for the breach of self-isolation requirements at the regional level remains questionable</li><li>Russia has enacted ‘anti-fake news’ legislation which may be used by authorities to suppress dissent at the government’s response to coronavirus</li></ul>

# SINGAPORE

*Sanya Samtani*

## I. Covid-19 Background

As of 22 April 2020, Singapore had 11,178 positive cases of COVID-19, 12 deaths due to COVID-19 and 896 recovered from COVID-19.<sup>216</sup>

Singapore was one of the countries that was badly hit by the outbreak of SARS (Severe Acute Respiratory Syndrome) in 2003, with 230 positive cases and 33 deaths.<sup>217</sup> In the aftermath of SARS, the Singapore government set up the Disease Outbreak Response System Condition (DORSCON) framework nested within the Ministry of Health to prepare for the prevention, containment and control of future outbreaks of infectious diseases.<sup>218</sup> This system has been tested in 2009 (H1N1) and 2016 (Zika virus). The DORSCON framework was updated as of 09 January 2020 to specifically respond to COVID-19.

DORSCON is engaged at five levels depending on the extent of the perceived threat – green, yellow, orange, red and black with green being the level of lowest severity and black being the highest.<sup>219</sup> In a nutshell, the engagement of DORSCON for flu related outbreaks leads to the following response at each level:

- Green, for the state to undertake surveillance measures to map the spread of the infection, including phone surveillance, liaising with the WHO; infection control measures, such as phone surveillance for contact-tracing, triage and isolation as well as encouragement of other flu vaccines to reduce the load on the healthcare system; maintain anti-viral stockpiles; communication to the public through Ministry of Health hotlines as well as public education and updates regarding the situation; readiness measures to ensure that healthcare workers have full personal protective equipment (PPE), identification of a designated hospital for treatment of infectious cases; to ensure that dedicated ambulances are on standby, initiate research for vaccine etc.
- Yellow, for the state to prevent the import of cases in addition to measures taken in Green, surveillance measures to be increased with reporting requirements on hospitals, monitoring of health of healthcare workers; restriction of inter-hospital movement, temperature screening of the population in high-risk areas, full PPE provided to all healthcare workers including GPs, imposition of home quarantine for contacts of infectious cases; community measures such as temperature screening at ports of entry; activate emergency purchase of anti-virals, preparation for alternative housing if required.

<sup>216</sup> [Singapore: Coronavirus, Worldometers](#), 2020.

<sup>217</sup> Jason CH Yap and Lewis RF (2020) “Covid-19: The response in Singapore”, Nuffield Trust guest comment.

<sup>218</sup> [Being Prepared for a Pandemic](#), Ministry of Health, Singapore, 2020

<sup>219</sup> [What do the different DORSCON levels mean?](#), Ministry of Health, Singapore, 2020.

- Orange, for the prevention of spread of the disease and reduce transmission still preserving essential services in addition to measures taken in Yellow, reporting mechanism extended to small clinics and nursing homes; all hospitals to prohibit visitors; specialised flu clinics to be opened; prioritise high-risk groups for vaccination if available; increased public education campaign to prevent stockpiling of drugs and market shortages, encourage use of flu clinics rather than general hospitals; consider closing schools and suspending public gatherings.
- Red, for regaining control of the situation in cases of widespread community transmission whilst continuing essential services in addition to measures taken in Orange, reduce additional reporting measures taken in Orange as healthcare system is likely to be overwhelmed; for infection control, remove restrictions on inter-hospital movement, remove dedicated ambulance service; encourage wearing of masks if necessary; avoidance of crowded areas.
- Black, for medical and health considerations to drastically take priority over social and economic considerations in addition to measures taken in Red, suspend all public gatherings, consider imposing curfew.<sup>220</sup>

DORSCON provides for a control structure, the Homefront Crisis Ministerial Committee, headed by the Minister of Home Affairs, to coordinate Singapore's overall response to COVID-19. Additionally, Homefront Crisis Executive Committee coordinates the various Crisis Management Groups set up under the aegis of cabinet portfolios for specialised sector-based responses. The lead Crisis Management Group for COVID-19 is the Ministry of Health, with three subcommittees nested within it (Inter-Ministry Operations Committee; Task Force, chaired by the Health Minister and Minister for National Development; and the Operations Coordination Committee).

Singapore's response to COVID-19 began on 02 January 2020, when the Ministry of Health issued advisories to all healthcare professionals (detailed timeline at footnote).<sup>221</sup> Singapore raised the DORSCON level from yellow to orange on 07 February 2020, when cases of community transmission of COVID-19 were beginning to surface.<sup>222</sup> Additionally, Singapore implemented strict border controls on 24 March 2020 suspending tourist visas and short-term visitors.<sup>223</sup> On 03 April 2020, the Prime Minister, in an address to the public, announced a 'circuit breaker' that was to be implemented with the closure of all but essential services, and stay-home orders as of 07 April 2020 until 04 May 2020.<sup>224</sup> The number of cases spiked unexpectedly and on 21 April 2020, the Prime Minister announced that although the DORSCON level remains at orange, the circuit breaker measures would be strengthened and extended till 1 June 2020 to prevent the further transmission of the virus.<sup>225</sup>

<sup>220</sup> [Influenza and Pandemic Readiness and Response Plan](#), Ministry of Health Singapore, 2020..

<sup>221</sup> [Singapore COVID-19 Response Timeline](#), 2020.

<sup>222</sup> [Risk Assessment Raised to DORSCON Orange](#), Ministry of Health Singapore, 2020.

<sup>223</sup> [Coronavirus: An unprecedented Singapore border closure, in unprecedented times](#), Strait Times (24 March 2020).

<sup>224</sup> [Prime Minister Lee Hsien Loong's Statement on the COVID-19 Situation in Singapore](#), 3 April 2020 .

<sup>225</sup> [Prime Minister Lee's Address on the COVID-19 Situation in Singapore](#), 21 April 2020.

## **II. Constitutional and human rights framework**

Singapore's constitution, in Part V, provides for the separation of powers which splits the government into three organs: (1) the Executive, which comprises of the President, the Prime Minister, the Deputy Prime Minister, Senior Ministers, Cabinet and Government organisations, (2) the Legislature, which comprises of President, Parliament – comprising of Members of Parliament (MPs), Non-constituency MPs and Nominated MPs, and (3) the Judiciary, with the Supreme Court which sits as the High Court and as the Court of Appeal as the case may be, and the lower courts (State Courts) which comprise of District and Magistrate's Courts.<sup>226</sup>

Part IV of the Constitution guarantees certain "Fundamental Liberties". They are protection of the life and liberty of a person (limitable by law),<sup>227</sup> protection against retrospective criminal prosecution and double jeopardy,<sup>228</sup> right to equality and non-discrimination with an explicit exception for personal laws,<sup>229</sup> prohibition of banishment and restrictions on movement of Singaporean citizens (with legislated exceptions including public health),<sup>230</sup> freedom of expression, association and assembly (with legislated exceptions including the security of Singapore),<sup>231</sup> freedom of religion,<sup>232</sup> and certain rights in respect of education.<sup>233</sup>

Singapore has not signed or ratified the two human rights covenants – the International Covenant on Civil and Political Rights and the International Convention on Economic Social and Cultural Rights. However, Singapore is party to the Convention on the Elimination of All Forms of Discrimination against Women, Convention on the Rights of the Child, Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict and the Convention on the Rights of Persons with Disabilities. Singapore has not ratified any protocols to enable treaty bodies to conduct inquiries or hear individual communications.<sup>234</sup>

## **III. Legal Basis for Measures**

The legal basis for the measures adopted under DORSCON is the Infectious Diseases Act 1977 ("the Act").<sup>235</sup> This Act has been amended as recently as 28 February 2020. Healthcare professionals are empowered to report patients to the Ministry of Health and National Environment Agency if they are suspected have contracted of any of the listed infectious diseases under s 6 of the Act (present in the First or Second Schedule). COVID-19 was added to the Second Schedule to the Act that described "dangerous infectious diseases".

<sup>226</sup> [Constitution of Singapore](#).

<sup>227</sup> Section 9, Constitution.

<sup>228</sup> Section 11, Constitution.

<sup>229</sup> Section 12, Constitution.

<sup>230</sup> Section 13, Constitution.

<sup>231</sup> Section 14, Constitution.

<sup>232</sup> Section 15, Constitution.

<sup>233</sup> Section 16, Constitution.

<sup>234</sup> Office of the High Commissioner for Human Rights [Singapore](#), 2020.

<sup>235</sup> [Infectious Diseases Act 1977](#).

Additionally, under s 73 of the Act, the Minister of Health promulgated the Infectious Diseases (COVID-19 — Stay Orders) Regulations 2020 on 25 March 2020. These regulations made it a criminal offence for anyone to contravene stay orders under it.<sup>236</sup> As the situation keeps changing, regulations are constantly being updated. Most recently, as of 10 April 2020, the regulations that were previously promulgated on the Measures to Prevent Spread of COVID-19 and Workplace Measures to Prevent Spread of COVID-19 Regulations have been revoked,<sup>237</sup> and additional COVID-19 (Temporary Measures) (Control Order) Regulations 2020 have been passed to respond to recent developments.<sup>238</sup>

In addition to the Act and the Regulations, there are a number of Advisories issued by various ministries in relation to their sector.<sup>239</sup> In order to enable research towards a vaccine and improved testing, the Minister of Health promulgated the Biological Agents and Toxins (COVID-19 Research Laboratory — Exemption) Regulations 2020 under the Biological Agents and Toxins Act.

Most recently, the COVID-19 (Temporary Measures) Act was passed. Singapore also released the Resilience Budget, which is a supplementary budget in light of the evolving COVID-19 situation to allocate an additional 55 billion SGD towards the COVID-19 response.<sup>240</sup> The various regulations promulgated pursuant to the Covid-19 (Temporary Measures) Act and the Infectious Diseases Act 2020 are addressed in detail in this section.

The Infectious Diseases Act (“the Act” or “IDA”) provides for the Director of Medical Services<sup>241</sup> to authorise the following:

- surveillance mechanisms to monitor, prevent and contain infectious diseases, criminalisation of failure to comply;<sup>242</sup>
- criminalisation of acting in a manner likely to expose others to a dangerous infectious disease (under Second Schedule, which includes COVID-19);<sup>243</sup>
- mandatory medical examination if required, criminalisation of failure to comply;<sup>244</sup>
- criminalisation of false or misleading information in relation to donation of blood (fine of up to 20,000SGD or imprisonment <2 years);<sup>245</sup>

<sup>236</sup> The penalty is a fine of up to 10,000SGD or imprisonment for <6 months.

<sup>237</sup> Infectious Diseases Revocation Regulations 2020.

<sup>238</sup> COVID-19 (Temporary Measures) (Control Order) (Amendment) Regulations 2020 and COVID-19 (Temporary Measures) (Control Order) (Amendment No. 2) Regulations 2020 as on 10 April 2020.

<sup>239</sup> [COVID-19](#), Ministry of Manpower Singapore. See also: [Past Updates on COVID-19](#) (organised by date), Ministry of Health Singapore.

<sup>240</sup> [Supplementary Budget Statement](#), Singapore Budget.

<sup>241</sup> [New Director of Medical Services in the Ministry of Health](#).

<sup>242</sup> Section 7, 10, 16, 19A, IDA.

<sup>243</sup> Section 21A IDA.

<sup>244</sup> Section 8 IDA.

<sup>245</sup> Section 11 IDA.

- criminalisation of failure to comply with closure<sup>246</sup> or disinfecting premises if directed to do so;<sup>247</sup>
- forcible entry (without warrant) to notified premises permitted by authorised persons if failure to comply with disinfecting<sup>248</sup> and closure;<sup>249</sup> closure order must be renewed every 14 days if premises closed due to threat of outbreak;<sup>250</sup> provision for aggrieved persons to appeal direct to Minister;<sup>251</sup>
- criminalisation of failure to destroy and dispose of food, animals or water if directed to do so;<sup>252</sup>
- forcible destruction of food, animals or water (without warrant) by authorised persons (including police officers) if failure to comply after notification, as well as debt recovery by government if expenses incurred in connection with this;<sup>253</sup>
- criminalisation of failure to comply with directions on wake and disposal of corpses in case of death;<sup>254</sup>
- forcible entry and disposal of corpse by authorised persons to ensure compliance, as well as debt recovery by government if expenses incurred in connection with this;<sup>255</sup>
- criminalisation of failure to comply with isolation orders;<sup>256</sup>
- notification of areas by the appropriate Minister as “isolation areas” and place restrictions on freedom of movement within those areas, institute reporting mechanisms and surveillance of individuals within the area, until a specified date or until revocation by said Minister;<sup>257</sup>
- police officers empowered to take “any action necessary” to effect “isolation area” orders and arrest without warrant those persons who attempt to leave or are suspected to have left the “isolation area” in the same section;<sup>258</sup>
- appropriate Minister may designate areas within the country or the whole country as a “restricted zone” after making a declaration of public health emergency thereby restricting entry and exit of people within public and private premises and prohibiting/restricting public gatherings to be reviewed every 14 days;<sup>259</sup>
- criminalisation of failure to comply with restrictions within a “restricted zone” and empowerment of police officers to arrest without warrant;

<sup>246</sup> Section 18 IDA.

<sup>247</sup> Section 12 IDA.

<sup>248</sup> Section 12 IDA.

<sup>249</sup> Section 18 IDA.

<sup>250</sup> Section 19 IDA.

<sup>251</sup> Section 19 IDA.

<sup>252</sup> Section 13 IDA.

<sup>253</sup> Section 13 IDA.

<sup>254</sup> Section 14 IDA.

<sup>255</sup> Section 14 IDA.

<sup>256</sup> Section 15 IDA.

<sup>257</sup> Section 17 IDA. Five “Isolation areas” were declared by the Infectious Diseases (Declaration of Isolation Area) Notification 2020 (Nos. 1,2,3,4,5) (as on 10 April 2020).

<sup>258</sup> Section 17 IDA.

<sup>259</sup> Section 18 IDA.

- restriction of public gatherings outside of a declaration of public health emergency must be reviewed every 14 days, failure to comply with restrictions criminalised;<sup>260</sup>
- restriction of trade, businesses and occupation may take place through “preventative action”, failure to comply with such action criminalised;<sup>261</sup>
- criminalisation of operators’ failure to disseminate health advisories as required by the appropriate Minister to curb the spread of infectious diseases (such as COVID-19);<sup>262</sup>
- appropriate Minister empowered to declare an area outside Singapore “infected area” and restrict travel/entry to and from such area as specified;<sup>263</sup>
- criminalisation of failure to provide information if requested or providing false or misleading information from vessels seeking to enter Singapore (fine of up to 10,000SGD or imprisonment for <6 months);<sup>264</sup>
- criminalisation of failure to comply with health and sanitary measures imposed by Singapore upon vessel entering the country (fine of up to 10,000SGD),<sup>265</sup> as well as failure to provide food and water fit for human consumption (fine of up to 5,000SGD),<sup>266</sup>
- criminalisation of failure to comply with quarantine imposed on infected vessels (fine of up to 10,000SGD or imprisonment for <12 months or both);<sup>267</sup>
- criminalisation of failure to comply with Port Health Officer;<sup>268</sup>
- criminalisation of failure to comply with medical examination of all persons entering Singapore if directed to be examined,<sup>269</sup> as well as leaving Singapore if in a public health emergency.<sup>270</sup>

The Act also provides the following enforcement measures in the Magistrate’s Courts:<sup>271</sup>

- in connection with preventing outbreaks of infectious diseases the Director of Medical Services and any Health Officer so authorised may enter any premises forcibly without warrant as well as search, seize and destroy items that are connected to the suspected outbreak, require the provision of relevant information in connection with the outbreak, require a person to be subjected to a medical examination, restrict the movement of persons by order in connection with the outbreak;<sup>272</sup> aggrieved persons may approach a Magistrate within 48 hours for the confirmation or disallowance of seizure of items;<sup>273</sup>
- wide-ranging investigatory powers, empowering police officers or Health Officers to obtain evidence connected to the outbreak in the form of statements, documents,

<sup>260</sup> Section 20 IDA.

<sup>261</sup> Section 21 IDA.

<sup>262</sup> Section 21B IDA.

<sup>263</sup> Section 26, 27 IDA.

<sup>264</sup> Section 28 IDA.

<sup>265</sup> Section 29 IDA.

<sup>266</sup> Section 37 IDA.

<sup>267</sup> Section 33, 34 IDA.

<sup>268</sup> Section 37, 39, 42, 43, 44 IDA.

<sup>269</sup> Section 45A IDA.

<sup>270</sup> Section 45B IDA.

<sup>271</sup> Section 66 IDA.

<sup>272</sup> Section 55 IDA.

<sup>273</sup> Section 55 IDA.

information such as names and addresses<sup>274</sup> etc from persons and the criminalisation of non-compliance with such investigation, subject to the presumption against self-incrimination;<sup>275</sup>

- police and Health Officers powers of arrest without warrant if authorised by the Director of Health Services for specific offences in the Act, with the caveat that no person shall be detained longer than is necessary to appear before a Magistrate and after that detention authorised only through a court order;<sup>276</sup>
- extraordinary powers of the Director of Health Services to formulate and gazette emergency measures before implementation and criminalisation of obstruction to such measures as well as failure to comply with emergency measures (fine of up to 10,000SGD or imprisonment <6 months or both).<sup>277</sup>
- The Act provides for general penalties where no specific penalty is prescribed: for a first offence, on conviction liable to pay fine of up to 10,000SGD or imprisonment <6 months or both; for a second offence, on conviction liable to pay fine of up to 20,000SGD or imprisonment <12 months or both;<sup>278</sup> moreover, for piercing the corporate veil for offences by corporations as well as associations and partnerships;<sup>279</sup>
- Offences under this Act are compoundable.<sup>280</sup>

In addition to the Infectious Diseases Act, the Singapore government has passed the Covid-19 (Temporary Measures Act) 2020 to offer and regulate relief from performance of contracts and remission of property tax during this period as well as regulate temporary control orders to curb the spread of Covid-19. The Act itself prescribes a time period for which it may be declared operational by a gazetted order of the Minister for Law.<sup>281</sup> After the expiry of the time period, the Minister is empowered to extend the period by a gazetted order if necessary.<sup>282</sup> The Minister for Law promulgated regulations pursuant to this Act.<sup>283</sup>

Part 7 of the Act empowers the relevant Minister to promulgate regulations on the basis that the Minister is satisfied that Covid-19 constitutes a “serious threat to public health” due to widespread transmission and that an additional Control Order is necessary to supplement the IDA (and other related laws).<sup>284</sup> The Minister is empowered to restrict movement, participation and access to facilities. If the Control Order is promulgated (or amended after promulgation) it must be presented to Parliament soon after publication in the gazette. Moreover, Parliament is empowered to annul a provision in the Control Order promulgated by the Minister. The first violation of a Control Order promulgated in terms of this section is criminalised with penalties

<sup>274</sup> Section 57 IDA.

<sup>275</sup> Section 55A IDA.

<sup>276</sup> Section 56 IDA.

<sup>277</sup> Section 58 IDA.

<sup>278</sup> Section 65 IDA.

<sup>279</sup> Section 67B, 67C IDA.

<sup>280</sup> Section 68 IDA. This was amended by the Infectious Diseases (Composition of Offences) Regulations, 2020.

<sup>281</sup> The prescribed period is 6 months commencing from 06 April 2020, pursuant to the COVID-19 (Temporary Measures) (Prescribed Period) Order 2020.

<sup>282</sup> Section 3, Covid-19 (Temporary Measures Act) 2020.

<sup>283</sup> Covid-19 (Temporary Measures) (Temporary Relief for Inability to Perform Contracts) Regulations 2020.

<sup>284</sup> Section 41, Covid-19 (Temporary Measures Act) 2020.

of a fine not greater than 10,000SGD or imprisonment for a period of less than six months, and a repeat violation of the order is criminalised to the extent of a fine below 20,000SGD or imprisonment for a period below 12 months or both.<sup>285</sup> The Act also provides for enforcement officers to be appointed by the Minister including police officers, public officers, statutory body officers, auxiliary police officers as well as health and other authorised officers under the IDA. There is a good faith exemption from liability against enforcement officers in relation to discharging their duties under this Act. Failure to comply with enforcement officers is also criminalised with penalties of a fine not greater than 10,000SGD or imprisonment for a period of less than six months or both and a repeat failure to comply is criminalised to the extent of a fine below 20,000SGD or imprisonment for a period below 12 months or both.<sup>286</sup>

Moreover, under section 73 of the IDA, the Minister for Health promulgated the Infectious Diseases (Covid-19 Stay Orders) Regulations 2020 on 25 March 2020. These regulations empower police officers, immigration officers and Health Officers as well as the Director of Health Services, to order an identified individual (those individuals who have entered from outside Singapore, those who have been in contact with infected persons, those who are at risk of being infected, those who are infected, those who are undergoing testing) to go remain/stay in a particular place for up to and including 14 days from the date of the Order. Failure to comply with this stay order is criminalised with penalties of a fine not greater than 10,000SGD or imprisonment for a period of less than six months or both. There are only two exemptions from this order – they are first, for the purposes of obtainment of Covid-19 medical treatment or other emergency medical treatment; and second, with the permission of the Director of Health Services.<sup>287</sup> Moreover, if the identified individual allows an outsider into their accommodation (except for the delivery of food and essential items), fails to wear a mask when leaving, fails to inform their employer / school if they are teaching and fails to respond to a call/message sent by the Director or Health Officer, that individual is guilty of an offence and is criminally liable to penalties of a fine not greater than 10,000SGD or imprisonment for a period of less than six months or both.

#### **IV. Review of Measures Adopted: alarm bells and best practices**

It is clear from the first section that there is a high level of political will to contain outbreaks of infectious diseases and a sophisticated system in place under the aegis of the Ministry of Home Affairs and the Ministry of Health to do so.<sup>288</sup> The section above details the legal landscape of restrictions that are in place under the Infectious Diseases Act and Regulations promulgated pursuant to the Act.

<sup>285</sup> Section 34, Covid-19 (Temporary Measures Act) 2020.

<sup>286</sup> Section 35, Covid-19 (Temporary Measures Act) 2020.

<sup>287</sup> Section 3, Infectious Diseases (Covid-19 Stay Orders) Regulations 2020.

<sup>288</sup> A detailed review of the capability of the Singaporean governmental response conducted in 2018 is available in this WHO report: Joint external evaluation of IHR core capacities of Singapore, World Health Organization 2018 (WHO/WHE/CPI/REP/2018.25).

In order to assess the human rights impact of these measures, a contextual approach is necessary. Singapore's location as an island nation with heavy reliance on international trade and travel for the sustenance of its economy as well as its legal culture are relevant factors in assessing the measures that it has taken.

This section will outline the alarm bells and best practices that Singapore has engaged in to contain and prevent the transmission of Covid-19 from a human rights perspective.

#### **a. Alarm Bells (Rights-based)**

##### *i. Criminalisation as a deterrent*

The measures outlined above indicate that Singapore employs the levying of fines and imprisonment (between 6 months to 2 years depending on the offence) penalties to enforce compliance with (i) surveillance and reporting measures (ii) health and sanitary measures to prevent the spread of infection and outbreaks (iii) restrictions on freedom of movement to contain the spread of infection and outbreaks. The concerns that arise may largely be captured by the following inquiry – namely, are these measures (i) prescribed by law (they are largely prescribed by law either through gazette notifications, written orders, governmental regulations or within the Act itself)? (ii) Do they actually fulfil the aim of responding to the public health crisis of the COVID-19 pandemic? (iii) Are they narrowly tailored? (they seem to be applicable only in circumstances where those diseases present in the First, Second and Third Schedule empower the relevant authorities to invoke these measures, but at the same time police officers are at various points allowed wide-ranging investigatory powers) (iv) And importantly, is the criminalisation of breach/non-compliance and the penalties for the same proportionate to global health crisis that Singapore is grappling with? (v) What is the effect that this has on the full range of rights that Singaporeans are guaranteed under international human rights law? <sup>289</sup>

##### *ii. Vulnerable populations and Covid-19*

Singapore was initially hailed as an important example of how governments should deal with Covid-19 until recently when its cases began to spike and increase at a very fast rate. The spike in cases is directly linked with the conditions of migrant workers in the country. The conditions in which Singapore houses its migrant workers have been well-documented as extremely poor.<sup>290</sup> According to Singapore's building codes,<sup>291</sup> dormitories mandatorily provide each occupant with a minimum of 4.5 square metres to themselves. Each dormitory has approximately 10 bunk beds without partitions.<sup>292</sup> The conditions are unsanitary, overcrowded

<sup>289</sup> See importantly, [Statement on the Coronavirus Disease \(COVID-19\) Pandemic and Economic, Social and Cultural Rights](#), E/C.12/2020/1.

<sup>290</sup> Amnesty International, [Singapore: Over 20,000 migrant workers in quarantine must be protected from mass infection](#), See also, Transient Workers Count Too, [Statement on migrant workers in Asia](#).

<sup>291</sup> [Independent Workers Dormitories Guidelines](#).

<sup>292</sup> Transient Workers Count Too, [Covid-19: the risks from packing them in,](#).

and impossible for the maintenance of 1 metre distance as recommended by the government.<sup>293</sup> Between 30 March 2020 and 01 April 2020, three different dormitories of migrant workers were hit by COVID-19. These dormitories consisted primarily of Indian and Bangladeshi male workers.<sup>294</sup> More than 100 inhabitants have tested positive for COVID-19.<sup>295</sup> The Singapore government's approach is to ring-fence these areas and contain the infection.<sup>296</sup> The three dormitories were then notified as "isolated areas" and placed under quarantine, with restrictions on movement within and outside them.<sup>297</sup> However, concerns have emerged that essential supplies, including food, sanitisers, masks, are not being provided by the government and when provided by private parties are denied to inhabitants.<sup>298</sup> The key concern here is the lack of protection of the basic human rights of migrant workers (both, those who live within these dormitories as well as those who live outside of them and have to commute through trucks) that has been further exacerbated by the rapid spread of COVID-19, leaving them as one of the most vulnerable groups in the country.<sup>299</sup>

### *iii. Phone surveillance*

The IDA, as outlined above, allows for surveillance in order to track and trace individuals suspected of being in contact with persons infected with Covid-19. Singapore has developed an app – *TraceTogether* – that collates the user's phone number on the Ministry of Health's server. Bluetooth technology is used to measure proximity between users building a digital map of users. When one user is infected the app requests consent of the user to upload their data log (this includes location data). Using this encrypted data, the state can then unencrypt the data to access the phone numbers of the users who were in contact with the infected user and alert them. The concerns that emerge from this app are the privacy of the users qua the government. The Ministry of Health server has the power to unencrypt the data and identify other users using the temporary IDs. Moreover, the location data itself is relative to the strength of the Bluetooth connection. There is no additional check from the government's side as to whether that person is actually infected or not in relation to sending the request for consent to unencrypt the data – there is a real possibility of a large number of individuals' data being unencrypted by the government. Although there is a guarantee that the data on the user's phone will be deleted in 21 days, there is no guarantee that the data will also be deleted from the government's servers after such time.<sup>300</sup>

<sup>293</sup> [Workers describe crowded, cramped living conditions at dormitory gazetted as isolation area](#), Straits Times (06 April 2020).

<sup>294</sup> Transient Workers Count Too, "[All person is scared](#)" — Bangladeshi workers amid Covid-19, ..

<sup>295</sup> [Covid-19: Media Statement by Transient Workers Count Too](#)

<sup>296</sup> [Remarks by Minister Lawrence Wong](#), Co-chair of the Multi-Ministry Taskforce on COVID-19, at Press Conference on COVID-19 at National Press Centre, 5 April 2020 .

<sup>297</sup> Observatory IHR, [Covid-19: The situation for migrant workers is worsening](#)..

<sup>298</sup> Change.org [Petition: Protect our migrant workers from Covid-19](#).

<sup>299</sup> See for the treatment of migrant workers pre-COVID-19: Amnesty International, [State of the World's Human Rights Report 2017/18](#).,

<sup>300</sup> University of Melbourne, [On the privacy of TraceTogether, the Singaporean COVID-19 contact tracing mobile app](#).

**b. Best Practices:**

*i. Parliamentary review*

As described above, a number of ministerial regulations mandate Parliamentary review after gazetting, further enabling legislative oversight over executive actions to respond to Covid-19. This is particularly important for accountability. As of 6 April 2020, the speaker made a strong statement in relation to justifying the continued sitting of Parliament in terms of public participation and accountability during Covid-19.<sup>301</sup> Parliament last sat on 7 April 2020, and will next sit on 04 May 2020.<sup>302</sup>

*ii. Political will and comprehensive legislative framework*

The DORSCON framework as well as the Infectious Diseases Act contemplates the situation of Covid-19 and legislates for exactly this eventuality. There is clear political will to act as well as the budget and legal framework to assist with responding to Covid-19.

*iii. Access to justice*

Courts (the Supreme Court, State Courts and Family Justice Courts) are continuing to function to hear essential and urgent matters during the period of the ‘circuit breaker’.<sup>303</sup> The Registrars of the various courts have issued circulars stating the matters that would be considered essential and urgent and hearings would take place online rather than in person. All other matters will be rescheduled to after 4 May 2020.

*iv. Prisoners’ rights*

Singapore has issued masks to every inmate and newly admitted inmates are separately quarantined for 14 days before joining the main prison. Additionally, social distancing has been implemented throughout the prison along with regular temperature-taking of inmates. Family visits, however, have been suspended for the duration of the ‘circuit breaker’.<sup>304</sup>

*v. TraceTogether app privacy*

The data that the app requests are consent-based. Moreover, the app protects the privacy of users qua users by refreshing temporary user IDs frequently and the privacy of users qua hackers by encrypting the data. Additionally, the data collected by the app on the user’s phone is deleted after 21 days.<sup>305</sup> The Personal Data Protection Commission of Singapore has

<sup>301</sup> [Announcement by Speaker](#), Parliament of Singapore

<sup>302</sup> [Website](#) of Parliament, Singapore

<sup>303</sup> Supreme Court, [State Courts and Family Justice Courts to hear only essential and urgent matters from 7 April to 4 May 2020](#).

<sup>304</sup> [Crime fighting during Covid-19](#)

<sup>305</sup> University of Melbourne, [On the privacy of TraceTogether, the Singaporean COVID-19 contact tracing mobile app](#).

provided detailed advisories regarding the collection of data for Covid-19 related purposes which the Ministry of Health and any other organisations that seek to collect data for tracking and tracing efforts must comply with.<sup>306</sup>

## V. Summary Evaluation

<b>Best Practices</b>
<ul style="list-style-type: none"><li>• Parliamentary oversight, and executive response rooted in and subject to periodic legislative review</li><li>• Sunset clauses within executive regulations, promulgation and re-promulgation / review subject to Parliamentary scrutiny upon expiry</li><li>• Political will and extensive legislative framework, sophisticated 'Disease Outbreak Response System Condition' (DORSCON) framework engaging various ministries for a coordinated response</li><li>• Access to justice through the continued functioning of the court system.</li><li>• Specific safeguards adopted to ensure prisoners' health in relation to Covid-19</li><li>• Use of technology for tracking and tracing with safeguards for use of data (see concerns for a full picture of the app TraceTogether)</li></ul>
<b>Concerns</b>
<ul style="list-style-type: none"><li>• Proportionality of criminal sanctions and general recourse to criminal sanctions for violations of 'circuit breaker' measures</li><li>• Vulnerable populations (particularly migrant workers) hardest hit due to pre-existing inequalities</li><li>• Privacy concerns (such as lack of accountability) for state-run TraceTogether app data storage and deletion</li></ul>

<sup>306</sup> [Advisory on Collection of Personal Data for COVID-19 Contact Tracing](#), PDPC Singapore.

# SOUTH AFRICA

*Dr Nick Friedman*

This section begins with an overview of South Africa’s constitutional framework, including its (i) provision for the protection and limitation of human rights, (ii) requirements that administrative action is lawful, reasonable and fair and, more broadly, its commitment to the rule of law, and (iii) mechanisms for ensuring institutional accountability. The section then describes some of the principal measures currently being taken by the South African government to prevent and mitigate COVID-19 and discusses the primary human rights impacts these measures are likely to have.

## I. Constitutional Framework

South Africa’s Constitution is the supreme law of the land: all law and conduct inconsistent with it is invalid.<sup>307</sup> Its super-entrenched opening section commits the country to the pursuit of several fundamental values, including human dignity, the achievement of equality, the advancement of human rights and freedoms, the supremacy of the Constitution and the rule of law, and a commitment to accountable, responsive, and open government.<sup>308</sup>

### a. Bill of Rights

The Constitution enshrines an expansive Bill of Rights, including civil, political, and socio-economic rights.<sup>309</sup> The state is required to ‘respect, protect, promote and fulfil’ these rights.<sup>310</sup> As this formulation suggests, the state has negative duties to refrain from infringing rights as well as certain positive duties—to prevent the infringement of rights by third parties and to take steps to broaden and enhance the enjoyment of rights.

The state’s positive obligations are made plain by the text of certain rights. With respect to socio-economic rights, for example, the state is generally required to ‘take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation’ of each of these rights.<sup>311</sup> However, the Constitutional Court has held that other rights, including the rights to life, dignity, and freedom and security of the person, ‘oblige[] the

<sup>307</sup> Constitution of the Republic of South Africa, 1996 (hereafter, ‘Constitution’), section 2.

<sup>308</sup> Constitution, sections 1 and 74.

<sup>309</sup> These rights are afforded to natural persons and, to a lesser extent, juristic persons. Constitution, sections 7 and 8(4).

<sup>310</sup> Constitution, section 7(2). The following discussion focuses on the state’s human rights obligations, though it bears mention that the Bill of Rights also binds private and juristic persons (albeit it to a lesser extent). Constitution, section 8(2). Thus, when one person infects another, when a corporation shares the data of its customers, when a private hospital or housing provider denies someone access to their services—these situations, and many others likely to arise in the context of the COVID-19 pandemic, implicate the human rights duties of non-state actors.

<sup>311</sup> Constitution, sections 26 and 27; see also section 29(1)

State and its organs to provide appropriate protection to everyone through laws and structures designed to afford such protection'.<sup>312</sup>

All rights in the Bill of Rights may be limited but only by a law of general application, and only to the extent that such limitations are 'reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors'.<sup>313</sup> In assessing whether limitations are justified, courts undertake a proportionality assessment that is broadly similar to the kind found in many other jurisdictions: they weigh up the nature of the right and the extent of its limitation against the importance of the limitation's purpose and the relation between the limitation and its purpose, including whether there are less restrictive means to achieve it.<sup>314</sup>

All rights (with the exception of the rights to dignity and life) are also subject to complete or partial derogation in the event that Parliament declares a state of emergency.<sup>315</sup> States of emergency may only be declared when the 'life of the nation is threatened by war, invasion, general insurrection, disorder, natural disaster or other public emergency' and if the declaration 'is necessary to restore peace and order'.<sup>316</sup> To date, the South African government has not declared a state of emergency in response to the COVID-19 pandemic.

When courts interpret the Bill of Rights, they must consider international law and may consider foreign law.<sup>317</sup> Customary international law is domestically enforceable unless it is inconsistent with the Constitution or legislation; international agreements (with some exceptions) are domestically enforceable only after ratification by the legislature.<sup>318</sup> In practice, international law (with the exception of decisions by the European Court of Human Rights) been less influential on South African human rights jurisprudence than these provisions would suggest, while foreign law has been highly influential, particularly in the Constitutional Court.<sup>319</sup>

## **b. Administrative Action and the Rule of law**

Several rights in the Bill of Rights are of particular importance to holding government accountable. These include the rights to freedom of expression (including freedom of the press), the right of access to information (held not only by the state but also, where rights are implicated, by other persons), and the right of access to courts.<sup>320</sup> These also include the right to 'administrative action that is lawful, reasonable and procedurally fair', and accompanied by

<sup>312</sup> *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC) para 44. See also *Rail Commuters Action Group and others v Transnet Ltd t/a Metrorail* 2005 (2) SA 359 (CC).

<sup>313</sup> Constitution, section 36.

<sup>314</sup> Constitution, section 36. See *S v Bhulwana* 1996 (1) SA 388 (CC) para 18.

<sup>315</sup> Constitution, section 37.

<sup>316</sup> *ibid.*

<sup>317</sup> Constitution, section 39(1).

<sup>318</sup> Constitution, section 231.

<sup>319</sup> See, for example, *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC).

<sup>320</sup> Constitution, sections 16, 32, and 34.

written reasons.<sup>321</sup> This right has been given detailed effect by the Promotion of Administrative Justice Act 3 of 2000 (PAJA).

There is a complex jurisprudence concerning what qualifies as ‘administrative action’.<sup>322</sup> Importantly, however, the Constitutional Court has held that the exercise of all public power, whether or not it qualifies as administrative action, must comply with the rule of law: it must be: rationally related to a legitimate purpose, procedurally fair, accompanied by the giving of reasons, exercised in good faith, and properly construed.<sup>323</sup> The rule of law also requires that legislation affecting fundamental rights be accessible and precise, such that people can know what the law is and conform their conduct to it.<sup>324</sup>

### **c. Institutional Accountability Mechanisms**

The Constitution holds the exercise of public power accountable to a number of institutional mechanisms. Perhaps most obvious among these are the courts. The Constitution itself enjoins courts to declare invalid any legislation or other law that is inconsistent with it.<sup>325</sup> When they interpret legislation, courts are bound to promote the ‘spirit, purport and objects of the Bill of Rights’<sup>326</sup> and must also seek to interpret legislation consistently with international law.<sup>327</sup>

Chapter 9 of the Constitution establishes a range of independent and impartial state institutions intended to ‘strengthen constitutional democracy’.<sup>328</sup> These institutions include the Public Protector, which has the power to investigate improper conduct in any sphere of government,<sup>329</sup> as well as the South African Human Rights Commission, which has the power to investigate, report on, and to take steps to secure appropriate redress for human rights violations.<sup>330</sup> In addition, Chapter 10 of the Constitution provides for an independent and impartial Public Service Commission to promote (among other things) the efficiency, equitability, and ethical conduct of public administration.<sup>331</sup>

<sup>321</sup> Constitution, section 33.

<sup>322</sup> See, for example, *Permanent Secretary, Department of Education and Welfare, Eastern Cape v Ed-U-College (PE)* (Section 21) Inc 2001 (2) SA 1 (CC); *President of the Republic of South Africa v South African Rugby Football Union* 2000 (1) SA 1 (CC) (SARFU); *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC); *Nel v Le Roux NO* 1996 (3) SA 562 (CC). See also Section 1 of PAJA.

<sup>323</sup> *Democratic Alliance v President of South Africa and Others* [2012] ZACC 24; *Judicial Service Commission v Cape Bar Council* 2013 (1) SA 170 (SCA); *Albutt v Centre for the Study of Violence and Reconciliation* 2010 (3) SA 293 (CC); *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others* [2000] ZACC 1; SARFU *supra*; Fedsure *supra*. These requirements apply not only to executive but also to legislative action. See *Law Society of South Africa v Minister for Transport* 2011 (1) SA 400 (CC); *Poverty Alleviation Network v President of the Republic of South Africa* 2010 (6) BCLR 520 (CC); *New National Party v Government of the Republic of South Africa* 1999 (3) SA 191 (CC).

<sup>324</sup> *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC)

<sup>325</sup> Constitution, section 172.

<sup>326</sup> Constitution, section 39(2).

<sup>327</sup> Constitution, section 233.

<sup>328</sup> Constitution, section 181.

<sup>329</sup> Constitution, section 182.

<sup>330</sup> Constitution, section 184.

<sup>331</sup> Constitution, sections 195 and 196; see also SARFU *supra*.

Finally, beyond these broadly applicable, constitutionally prescribed mechanisms, a number of the COVID-related measures discussed below are subject to their own internal limitation provisions and mechanisms of accountability.

## **II. The Human Rights Implications of COVID-Related Measures**

As a general matter, the government's COVID-related measures at least plausibly further its positive obligations under two key human rights.

First, to the extent that these measures seek to prevent COVID-related deaths, they protect the right to life. Together with the right to dignity (on which see below), the right to life has been interpreted as the 'most important of all human rights, and the source of all other personal rights' in the Bill of Rights.<sup>332</sup> The positive duties imposed by the right to life have been articulated mainly in relation to protecting persons from threats of violence by others,<sup>333</sup> though the reasoning in these cases can arguably be extended to protecting persons from threats of infection by others.

Second, to the extent that these measures seek to ration and make most effective use of South Africa's limited medical capacity in the face of a pandemic likely to overwhelm it, these measures promote the 'right to have access to health care services'.<sup>334</sup> This right expressly provides for the state's positive duty to 'take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation' of the right. It has also been found to incorporate a negative duty on the state and others to desist from preventing or impairing the right.<sup>335</sup> Importantly, the right to health also provides that '[n]o one may be refused emergency medical treatment'.<sup>336</sup> This provision is aimed at a 'person who suffers a sudden catastrophe which calls for immediate medical attention'.<sup>337</sup> Its purpose is 'to ensure that treatment be given in an emergency, and is not frustrated by reason of bureaucratic requirements or other formalities'.<sup>338</sup>

Three other rights are also relevant to the government's aims. To the extent that these measures aim to prevent or mitigate non-fatal COVID-related illness, they arguably protect the right to bodily integrity.<sup>339</sup> However, there has been little applicable jurisprudence expounding the content of this right. By contrast, South African jurisprudence prominently centres dignity, both as a value and a self-standing right. The Constitutional Court has held that 'the constitutional protection of dignity requires us to acknowledge the value and worth of all

<sup>332</sup> *S v Makwanyane and Another* (CCT3/94) [1995] ZACC 3.

<sup>333</sup> See, for example, *Carmichele* supra; *Van Eeden v Minister of Safety and Security* [2002] ZASCA 132.

<sup>334</sup> Constitution, section 27(1)(a).

<sup>335</sup> *Minister of Health and Others v Treatment Action Campaign and Others* (No 2) [2002] ZACC 15 para 46.

<sup>336</sup> Constitution, section 27(3).

<sup>337</sup> *Soobramoney v Minister of Health (KwaZulu-Natal)* [1997] ZACC 17 para 20.

<sup>338</sup> *ibid.*

<sup>339</sup> Constitution, section 12(2).

individuals as members of our society’,<sup>340</sup> though the precise content of the right is hard to pin down. Given the normative purchase of dignity with the South African constitutional order, both the state and human rights victims are likely to rely on it. Finally, the government may argue that at least some of its measures aim to further the right to equality. South Africa is a highly unequal and relatively under-resourced country. It may be that more extreme preventive measures are required *ex ante* to maximise the chances of protecting South Africa’s poorest and most marginalised groups, since there will be limited means to provide them with accessible and effective treatment post-infection.

The various COVID-related measures that the South African government is now undertaking may, therefore, be characterised as attempts to comply with its negative and positive obligations with respect to a number of important rights. However, as discussed below, they may also infringe the government’s negative duties with respect to a range of other rights. Indeed, given the expansive range of rights protected by the South African constitutional order, and the sweeping nature of the pandemic and the measures required to prevent it, virtually all of these rights may be infringed in some way by one measure or another. The rights infringement might be plain from the face of the measure itself, or it may arise from the way a measure is enforced (for example, through excessive policing or burdens that fall disproportionately on black South Africans, women, the poor, and so on).

The principal challenge for the South African government, and for courts and other bodies tasked with reviewing the human rights implications of these measures, concerns how the Constitution requires the balance to be struck between the state’s competing human rights obligations. With regard to the assessment of a measure’s proportionality, the protection of life and access to emergency medical treatment are clearly important purposes. Yet, the rights and freedoms that may be infringed by certain measures (as discussed below) are also important. Weighing these two factors against one another is unlikely to advance the proportionality analysis in a meaningful way. The extent to which a measure infringes rights will, of course, be highly relevant. In cases where infringements are severe, the result of the proportionality analysis will come down, as it frequently does, to a highly fact-sensitive inquiry into how necessary or effective is the impugned measure in protecting life and access to health care, and, in particular, whether there are less restrictive means of achieving those aims to the same degree.

The remainder of this section discusses the likely human rights impacts of some of the most significant COVID-related measures currently being taken in South Africa.

#### **a. Statutory Framework**

Many of the COVID-related measures now being taken trace their validity to the Disaster Management Act 57 of 2002 (the Act). Its purpose is to ‘provide for an integrated and

<sup>340</sup> *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* (CCT11/98) [1998] ZACC 15 para 28.

coordinated disaster management policy that focuses on preventing or reducing the risk of disasters, mitigating the severity of disasters, emergency preparedness, rapid and effective response to disasters and post-disaster recovery and rehabilitation'.<sup>341</sup> The Act is administered by a 'Minister' designated by the President.<sup>342</sup> On 15 March 2020, the Minister of Co-operative Government and Traditional Affairs, Dr Nkosazana Dlamini Zuma, having been so designated, declared a 'national disaster' in terms the Act.<sup>343</sup> The Act defines a 'national disaster' as, roughly, an occurrence of great magnitude which causes or threatens to cause death, injury or disease, damage to property, infrastructure or the environment, or disruption of the life of the community.<sup>344</sup>

The Act permits the Minister, after consulting relevant Cabinet members, to make regulations in a wide range of areas in order to manage the disaster. The Act makes the national executive primarily responsible for the coordination and management of national disasters, which must be undertaken pursuant to existing legislation and any regulations issued by the Minister.<sup>345</sup>

The Minister has issued a number of regulations in terms of the Act, including various amendments and repeals. The regulations empower a range of government ministers to issue directions and guidelines applicable during the state of disaster. A wide range of directions and guidelines has been issued.<sup>346</sup> Broadly speaking, persons failing to comply with various aspects of the regulations are liable to a fine or to imprisonment for a period not exceeding six months or both.

Apart from their substantive impact on human rights (discussed below), the making of these regulations and directions is subject to the Constitution's controls on the exercise of public power, including the requirements of the rule of law (as set out above). The Act itself provides further limitations on the powers it contains, including that the regulation-making power may be exercised only to the extent that it is necessary for the purpose of 'assisting and protecting the public, providing relief to the public, protecting property, preventing or combating disruption of dealing with the destructive and other effects of the disaster'.<sup>347</sup>

Importantly, the President has established a body known as the National Command Council (NCC), which appears to be exercising significant decision-making power in relation to the pandemic, including some degree of control over the issuing and implementation of the regulations. Concerns have been raised concerning the constitutionality of this delegation of power by the President, in particular whether the NCC is improperly interfering with the exercise of executive authority (including the implementation of national legislation and the development and implementation of national policy) that the Constitution vests in the President

<sup>341</sup> Act, preamble.

<sup>342</sup> Act, section 3. See also Section 1 (defining 'Minister').

<sup>343</sup> Act, section 27. See Government Gazette No. 43096, Government Notice No. 313 of 15 March 2020.

<sup>344</sup> Act, section 1.

<sup>345</sup> Act, section 26.

<sup>346</sup> For a regularly updated repository of the regulations and directions, see [Coronavirus Guidelines](#).

<sup>347</sup> Constitution, section 27(3).

and members of the Cabinet.<sup>348</sup> The Constitution makes some provision for the President to transfer or assign executive functions, but it is unclear at the time of writing whether the relevant conditions have been met. <sup>349</sup>

### **b. Measures Impacting Accountability**

Under the doctrine of the separation of powers, the two organs of state with primary responsibility for holding the executive accountable are Parliament and the courts. However, both organs initially announced curtailments to their roles during the pandemic.

The declaration of national disaster coincided with a scheduled break in Parliament's programme, during which Members of Parliament work in their allocated constituencies. Parliament issued a press statement to describe its role during the state of disaster, observing that 'Parliament must not be seen as interfering with the responsibility of the Executive to implement the measures for which the National State of Disaster has been declared', and that requiring the executive to attend virtual meetings would 'risk taking them away from their extremely critical function of managing measures to combat spread of COVID-19'.<sup>350</sup> The press statement suggested that Parliament would hold the executive to account principally after once pandemic is over. The question of Parliament's proper constitutional role during the national disaster—particularly given that no state of emergency has been declared under the Constitution—is of fundamental importance to limiting the adverse human rights impacts of the executive's COVID-related measures. It is therefore welcome that, after initial self-imposed restraint, Parliament has more recently taken a more active position with respect to the scrutiny of executive management of Covid-19 emergency measures. <sup>351</sup>

With respect to the courts, the Chief Justice issued a statement saying that the courts 'will, as an essential service, remain open for the filing of papers and hearing of urgent applications, bail applications and appeals or matters relating to violations of liberty, domestic violence, maintenance and matters involving children'.<sup>352</sup> The Minister of Justice has also issued directions regulating the operation of courts.<sup>353</sup> There have been only a few reported court cases so far. An application was made directly to the Constitutional Court challenging the regulations and asserting that the coronavirus was not a threat; the Court dismissed the application on Monday 30 March on the grounds that it bore no prospects of success (in part, no doubt, because of how vaguely the challenge was framed).<sup>354</sup> Similarly, the Labour Court in Cape

<sup>348</sup> Constitution, section 85. See Manyane Manyane, '[Lawyers threaten Ramaphosa's National Command Council](#)' (IOL, 3 May 2020).

<sup>349</sup> Constitution, sections 97 and 101.

<sup>350</sup> Parliament of the Republic of South Africa, '[Constitutional Obligations of Parliament During Covid-19 Pandemic](#)' (Press Release, 5 April 2020).

<sup>351</sup> [Presiding Officers of Parliament Announce the Resumption of Business of Parliament](#), 17 April 2020.

<sup>352</sup> Office of the Chief Justice, '[Media Statement](#)'.

<sup>353</sup> 'Directions Issued in Terms of Regulation 10 of the Regulations under the Disaster Management Act, 2002', Government Gazette No. 43191, Government Notice No. 440 of 30 March 2020.

<sup>354</sup> Hola Bon Renaissance Foundation v President of the Republic of South Africa, Case CCT 52/20, Order (30 March 2020).

Town dismissed a case brought by the Health Workers Union relating to personal protective equipment on the basis that the Union had not established an evidential basis for the case.<sup>355</sup> Finally, the Act provides for an indemnity for those who exercise powers under the Act as long as they do so in good faith.<sup>356</sup> The constitutionality of this provision may be tested; even for states of emergency declared in terms of the Constitution itself, the Constitution prohibits Parliament from indemnifying state actors for unlawful acts.<sup>357</sup>

### c. Lockdown Regulations

Regulations have been issued providing for a strict, countrywide lockdown, including a significant new set of regulations issued on 29 April 2020.<sup>358</sup> These regulations repeal a range of prior regulations and provide for a system of ‘Alert Levels’ designating permissions and prohibitions of varying severity. At the time of writing, the government had declared Alert Level 4, as reflected in the restrictions discussed below.<sup>359</sup>

The lockdown regulations provide that:

- People are confined to their homes subject to some limited exceptions, including performing essential services, obtaining permitted goods or services, collecting social grants, seeking medical attention, or attending a close relative’s funeral.<sup>360</sup> Gatherings are prohibited.<sup>361</sup>
- Businesses are prohibited from operating during the lockdown except those providing essential or permitted services or those that can operate from home.<sup>362</sup> Permits must be obtained to certify the provision of essential services.<sup>363</sup>
- The sale of alcohol and tobacco products is prohibited.<sup>364</sup>
- Public transport is restricted.<sup>365</sup>
- All national borders are closed subject to limited exceptions, including some repatriation flights.<sup>366</sup>

These regulations substantially limit a number of related freedoms enshrined in the Bill of Rights: (1) the right to freedom of movement;<sup>367</sup> (2) the right to leave the Republic;<sup>368</sup> (3) the

<sup>355</sup> National Education Health & Allied Workers Union v Minister of Health and others, Case No. J-423-20 (11 April 2020).

<sup>356</sup> Act, section 61.

<sup>357</sup> Constitution, section 37(5).

<sup>358</sup> Government Gazette No. 43258, Government Notice No. 480 of 29 April 2020 ('Notice 480'). While repealing certain earlier regulations, Notice 480 provides that any directions issued under those regulations will continue in force unless subsequently varied, amended or withdrawn (Regulation 2(3)).

<sup>359</sup> Notice 480, Chapter 3.

<sup>360</sup> Notice 480, Regulations 16, 18, and Table 1.

<sup>361</sup> Notice 480, Regulation 23.

<sup>362</sup> Notice 480, Regulation 28 and Table 1.

<sup>363</sup> Notice 480, Regulation 28 and Table 1.

<sup>364</sup> Notice 480, Regulations 26 and 27.

<sup>365</sup> Notice 480, Regulation 20.

<sup>366</sup> Notice 480, Regulations 4(8) and 21.

<sup>367</sup> Constitution, section 21(1).

<sup>368</sup> Constitution, section 21(2).

right to assemble;<sup>369</sup> and (4) the right to freedom of association.<sup>370</sup> They also implicate the right to equality, which prohibits the state from unfairly discriminating on grounds of race, sex, and gender (among other prohibited grounds). In particular, concerns have been raised about whether people living in overcrowded conditions in informal housing (predominantly black South Africans) can reasonably be expected to comply with the lockdown.<sup>371</sup> There have also been reports of increased gender-based violence against women locked down with their abusers. The constitutionality of these infringements will turn in large part on their necessity for the protection of life and access to healthcare, and the availability of any less restrictive means to these ends.

There have been reports of excessive use of force by members of the police and defence force in enforcing the lockdown.<sup>372</sup> Excessive force infringes the right to freedom from violence<sup>373</sup> and is prohibited by the South African Police Service Act 68 of 1995, which requires ‘us[ing] only the minimum force which is reasonable in the circumstances’.<sup>374</sup> The Constitutional Court has held that there must be a proportional relation between the seriousness of the relevant offence and the force used, and that the state must ‘set an example of measured, rational, reasonable and proportionate responses to antisocial conduct and should never be seen to condone, let alone to promote, excessive violence against transgressors’.<sup>375</sup> There have also been reports of the executive seeking to punish behaviour that is not prohibited by the regulations.<sup>376</sup> Such action would be unlawful.

Three other rights-related matters bear mention with respect to the lockdown. First, schools have been closed since 18 March 2020 in terms of the first set of regulations and remain so today.<sup>377</sup> This constitutes a *prima facie* (and seemingly substantial) infringement of the right to basic education.<sup>378</sup> Second, prison visits were initially prohibited,<sup>379</sup> which constitutes a *prima facie* infringement of the visitation rights provided in the Bill of Rights,<sup>380</sup> and will continue to be subject to certain limitations.<sup>381</sup> Finally, business closures may implicate the right against arbitrary deprivation of property and the right to choose one’s trade, occupation or profession freely.<sup>382</sup>

<sup>369</sup> Constitution, section 17.

<sup>370</sup> Constitution, section 18.

<sup>371</sup> See Pierre de Vos, [‘Are some lockdown regulations invalid because they discriminate on the basis of race, or are not authorised by law?’](#) (Constitutionally Speaking, 31 March 2020)

<sup>372</sup> Human Rights Watch, [‘South Africa: Set Rights-Centred COVID-19 Measures’](#)

<sup>373</sup> Constitution, section 12(1)(e).

<sup>374</sup> Constitution, section 13(3)(b).

<sup>375</sup> *Ex parte Minister of Safety and Security: in re S v Walters* 2002 (4) SA 613 (CC) paras 38, 47.

<sup>376</sup> Pierre de Vos, ‘Management of the Covid-19 lockdown threatens respect for the rule of law’ (Daily Maverick, 22 April 2020) <<https://www.dailymaverick.co.za/opinionista/2020-04-22-management-of-the-covid-19-lockdown-threatens-respect-for-the-rule-of-law/>>.

<sup>377</sup> Government Gazette No. 43107, Government Notice 318 of 18 March 2020 (‘Notice 318’), Regulation 6.

<sup>378</sup> Constitution, section 29.

<sup>379</sup> Notice 318, Regulation 7.

<sup>380</sup> Constitution, section 35(2)(f).

<sup>381</sup> Notice 480, Regulation 25.

<sup>382</sup> Constitution, sections 22 and 25.

#### **d. Tracing Measures**

The regulations provide for the compilation of a COVID-19 database by the Department of Health ‘to enable the tracing of persons who are known or reasonably suspected to have come into contact with any person known or reasonably suspected to have contracted COVID-19’.<sup>383</sup> The database will include certain personal information for such persons: their names, identity numbers, residential and other addresses, cellular phone numbers, and the results of any test for COVID-19. The database shall draw on information provided by medical testing laboratories, the National Institute for Communicable Diseases, and accommodation establishments (including hotels, game reserves and holiday resorts). The information in the database is confidential and may only be used for the purposes of combating COVID-19.

The Director-General of Health may require any cellular phone service provider to furnish, without the person’s consent, the location or movements of a person who has tested positive for COVID-19 or who is reasonably suspected to have come into contact with a person who has tested positive. The information may only relate to the period from 5 March 2020 to the date on which the state of disaster ends, not beyond. The regulations also provide for the appointment of a designated judge who must receive weekly reports from the Department of Health containing the names and details of those whose locations were provided by cellular service providers. The designated judge may also make recommendations to the ministries of health, justice and correctional services and co-operative government and traditional affairs regarding ‘the amendment or enforcement of this regulation in order to safeguard the right to privacy while ensuring the ability of the Department of Health to engage in urgent and effective contact tracing to address, prevent and combat the spread of COVID-19’.<sup>384</sup> Kate O’Regan, a former Justice of the South African Constitutional Court, has been designated as the supervising judge.

Within six weeks after the state of national disaster is over, all persons whose information was obtained from cellular phone service providers must be notified, the Tracing Database must be also be de-identified, and a report must be made to Parliament and to the designated judge of what steps have been taken to de-identify the database.

The establishment of the database and the collection of location data from cellular service providers constitutes a *prima facie*, and quite sweeping, infringement of the right to privacy, which expressly includes rights against intrusion on private communications. On its face, the regulation contains a number of provisions that are clearly intended to limit its impact on the right to privacy, including restrictions on the purpose for which data may be obtained, the time for which it may be held, and most importantly, the appointment of a judge to oversee its collection and use. The constitutionality of this measure will turn in large part on the efficacy of the database in managing the spread of COVID-19 and the alternative means available to the government for conducting effective contact tracing.

<sup>383</sup> Notice 480, Regulation 8(2).

<sup>384</sup> Notice 480, Regulation 8(15).

### **e. Measures for Fake News**

The regulations make it an offence for any person to publish a statement on any medium (including social media) with the intention to deceive any other person about COVID-19, the infection status of any person, or any measure taken by the Government to address the pandemic.<sup>385</sup> At least one person appears to have been arrested and charged for breaching this provision, having apparently asserted on social media that people should refuse to be tested for COVID-19 because the swabs used in testing are themselves contaminated with the virus.<sup>386</sup>

This measure infringes the right to freedom of expression, which includes the freedom of the press and other media as well as the freedom to receive or impart information or ideas.<sup>387</sup> The purpose of protecting people from false information during a public health crisis is clearly an important public purpose. However, imposing content-based criminal prohibitions on freedom of speech will only be justifiable if they are narrowly crafted to achieve that purpose.<sup>388</sup>

### **f. Testing Measures**

The regulations provide that persons with confirmed or suspected cases of COVID-19, or who have been in contact with an infected person, may not refuse to submit to testing, medical treatment, or being removed to a place of quarantine, although any person who does refuse must be brought before a competent court to issue a warrant to require a medical exam.<sup>389</sup>

The forced submission to quarantine implicates the freedom of movement and related rights discussed above in relation to the lockdown measures, and in much the same way. The submission to forced testing and medical treatment infringes the right to bodily integrity, to the extent that this requires autonomy over one's body and medical treatment.<sup>390</sup> However, the regulation itself provides for oversight by courts in the event that testing, treatment, or quarantine is refused. This will at least go some way towards ensuring that infringements of bodily integrity are justified in relation to a legitimate government purpose.

<sup>385</sup> Notice 480, Regulation 14(2).

<sup>386</sup> Lauren Isaacs, '[CT man charged with spreading fake Covid-19 News due back in Court in July](#)' (Eyewitness News, 9 April 2020)

<sup>387</sup> Constitution, section 16.

<sup>388</sup> South African Government, '[Government monitors and responds to misinformation and fake news during Coronavirus Covid-19 lockdown](#)' (15 April 2020).

<sup>389</sup> Notice 480, Regulation 6.

<sup>390</sup> Constitution, section 12.

### **III. Summary Evaluation**

<b>Best Practices</b>
<ul style="list-style-type: none"><li>• The South African Constitution and the Disaster Management Act limit the executive's regulation-making power to measures necessary for and proportionate to preventing and mitigating the pandemic</li><li>• The South African Constitution provides robust mechanisms for judicial review of the lawfulness, fairness, and reasonableness of executive action</li><li>• Courts remain open to hear salient matters, including those related to the deprivation of liberty and domestic violence</li><li>• The government has thus far refrained from declaring a state of emergency in terms of the Constitution (which would permit derogation from human rights obligations), preferring the more moderate and more rights-respecting approach of declaring a state of disaster under the Disaster Management Act</li><li>• The government has appointed a judge to oversee the collection of personal data in relation to contact tracing, and to make recommendations with respect to the amendment or enforcement of the relevant regulations</li><li>• There are strict limitations on the personal data that may be collected for the purposes of contact tracing and on the purpose and time period for which it may be collected and held</li><li>• The regulations punishing the publication of false information related to the pandemic and the government's measures to control it require the demonstration of 'intent to deceive', which will limit the reach of the prohibition</li><li>• Persons refusing testing, medical treatment, or quarantine must be brought before a court to issue a warrant, thus providing some judicial supervision of rights infringements</li></ul>
<b>Concerns</b>
<ul style="list-style-type: none"><li>• Parliament initially expressed an intention to shirk its constitutional duty to hold the executive accountable during the pandemic, though it has recently become more active</li><li>• There have been reports of excessive enforcement of the lockdown and other measures by the police and other armed forces</li><li>• The National Command Council's exercise of executive authority, including the implementation of legislation and policy may be unconstitutional</li><li>• The Disaster Management Act provides for a broad (and possibly unconstitutional) indemnification of executive action undertaken in response to the pandemic</li><li>• The burdens imposed by the lockdown are unequally distributed between the wealthy and the poor</li><li>• The government has authorised sweeping, non-consensual collection of individuals' location data from cellular service providers</li><li>• The publication of certain criticisms of the government's response to the pandemic has been criminally prohibited, inhibiting media efforts to hold the government accountable</li><li>• Individuals may be forced to submit to testing, medical treatment, and quarantine</li></ul>

# UNITED KINGDOM

*Dr Elizabeth Stubbins Bates*

## I. Covid-19 Background

As at 1 May 2020, there had been more than 177,000 confirmed cases of Covid-19 in the United Kingdom, of whom 27, 510 patients had died. Until 28 April, the official death toll only included those who died in hospital, having tested positive for Covid-19. It did not include people who have died of suspected (not confirmed) Covid-19; those who have died of Covid-19 in care homes, hospices or in the community.<sup>391</sup> Data from the Office of National Statistics suggest a total of more than 41,000 deaths from Covid-19 as at 22 April 2020.<sup>392</sup>

There has been mounting political and scientific critique of the UK government's slow response to the Covid-19 pandemic, with arguments that delay in following sound public health principles has led to many avoidable deaths.<sup>393</sup> From initial briefings as to the emergence of novel coronavirus in January 2020, the government's response has been gradualist; dependent on an ongoing combination of non-binding advice and legislative restrictions (Coronavirus Act 2020, passed 25 March 2020;<sup>394</sup> and the Health Protection (Coronavirus) Regulations 2020 (last updated 22 April 2020)).<sup>395</sup> The relationship between advice and legislation, and alleged police and NHS misinterpretations of the legislation, are two among many human rights concerns about the UK's response to the pandemic.

In February 2020, travellers from some but not all states affected by the coronavirus were encouraged to self-isolate on arrival in the UK for the assumed 14-day incubation period; while those suffering symptoms of coronavirus and members of their household were also encouraged to self-isolate. On 10 February, following an alleged attempt by an infected person to abscond from a quarantine facility in the Wirral,<sup>396</sup> the first iteration of the Health Protection (Coronavirus) Regulations 2020 was made, to permit the detention of individuals reasonably believed to be infected with Covid-19 for the purpose of screening and testing.<sup>397</sup>

The UK raised the threat level from the coronavirus from 'moderate' to 'high' on 12 March 2020. People symptomatic with coronavirus were asked to stay at home for 7 days; sporting

<sup>391</sup> For an explanation of these official figures, see NHS England, [Covid-19 daily deaths](#)

<sup>392</sup> C Giles, '[UK coronavirus deaths more than double official figure, according to FT study](#)', *Financial Times*, 22 April 2020

<sup>393</sup> J Calvert et al, '[Coronavirus: 38 Days When Britain Sleepwalked into Disaster](#)'

<sup>394</sup> [Coronavirus Act 2020](#), s. 7

<sup>395</sup> [The Health Protection \(Coronavirus\) Regulations 2020](#), No 129. These Regulations are for England. Wales, Scotland and Northern Ireland have their own analogous Regulations.

<sup>396</sup> J Beadsworth and A Walawalker, '[UK Coronavirus Timeline: From Liberty To Lockdown](#)' (*EachOther*, 16 April 2020)

<sup>397</sup> '[Health Secretary Announces Strengthened Legal Powers to Bolster Public Health Protections against Coronavirus](#)' (GOV.UK)

events were not cancelled, but older people were advised not to go on cruises, and schools advised to cancel school trips.<sup>398</sup> On 15 March, the Secretary of State for Health and Social Care warned that ‘vulnerable groups’, including those over 70 and with ‘underlying health conditions’ would be asked to remain at home for an anticipated 12 weeks. The following day, the Prime Minister advised but did not require people to work from home and to avoid public transport when possible, to avoid large gatherings and contact with others, and not to go to pubs and restaurants. ‘Vulnerable groups’, including pregnant women, were advised to ‘self-isolate’ and practise ‘stringent social distancing’. Schools and workplaces were open, and only those with coronavirus symptoms and members of their families were required to self-isolate. On 20 March, the Prime Minister ordered schools, pubs, restaurants and gyms to close; an order which led to the Health Protection (Coronavirus, Business Closure) (England) Regulations 2020 (since revoked and replaced by the more comprehensive Health Protection (Coronavirus) Regulations 2020). On 23 March, this was followed by an announcement that everyone must stay at home, except for a list of prescribed ‘reasonable excuse[s]’, including obtaining food, medicine or medical care, and exercising outside. The latter two announcements now have a legislative basis. A further announcement on 23 March, that up to 1.5 million ‘extremely vulnerable’ people would be asked to practise ‘shielding’ (to stay within their home at all times, remaining at 2 metres distance from household members) does not have a statutory basis, so (like the earlier advice to adults over 70, and other ‘vulnerable persons’). On the assumption that individuals are choosing to ‘shield’ as a result of advice rather than a legal requirement, this might not be a deprivation of liberty within Article 5 of the European Convention on Human Rights (ECHR), but the case law offers no specific guidance on this point.<sup>399</sup>

## II. Human Rights Framework

The UK has no entrenched constitutional protections for human rights, although the ECHR and Article 1 of Protocol No 1 have been incorporated into UK law by the Human Rights Act 1998. The UK is a state party to the ECHR, the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), the International Covenant on Civil and Political Rights (ICCPR) and its Second Optional Protocol, the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and its Optional Protocols, the Convention on the Rights of the Child (CRC) and two of its Optional Protocols, and the Convention on the Rights of Persons with Disabilities (CPRD).<sup>400</sup>

Detaining individuals for the purpose of preventing the spread of epidemic disease is expressly permitted within Article 5(1)(e) of the ECHR; and the ‘protection of … health…’ is a legitimate aim which might justify legally-prescribed, proportionate limitations to the ECHR’s qualified

<sup>398</sup> BBC News, Boris Johnson Press Conference Summary, 12 March 2020

<sup>399</sup> [UK Government Guidance on Social Distancing for Everyone in the UK](#), last updated 30 March 2020; [Guidance on Shielding and Protecting People who are Clinically Extremely Vulnerable from Covid-19](#)

<sup>400</sup> UN Human Rights Treaty Body Database, [United Kingdom of Great Britain and Northern Ireland](#), Status of Ratifications

rights (Articles 8-11). The UK has not ratified Protocol No 4 of the ECHR, Article 2 of which provides for freedom of movement. Nor has the UK made a derogation under Article 15 ECHR in respect of the Covid-19 pandemic.

### **III. The Coronavirus Act 2020**

The Coronavirus Act 2020 received Royal Assent on 25 March 2020, having been fast-tracked through Parliament in four days. It contains specified provisions applicable to England and Wales, Scotland and Northern Ireland. Depending on the facts of cases which might emerge, the following provisions might engage the negative obligations under Articles 3 and 8 ECHR: temporary modifications of duties under mental health and mental capacity legislation (s 10, Schedules 8-11); powers to permit the non-performance of statutory duties on the NHS and local authorities in relation to assessments and provision of care support (ss 14-17, Schedule 12). The following provisions are relevant to the positive investigatory obligations under Article 2 ECHR: provisions to indemnify individual health care workers from liability in relation to the diagnosis, care and treatment of coronavirus patients (ss 11-13), and temporary modifications to the legislation on the registration of deaths and stillbirths, including the suspension of confirmatory medical certificates prior to cremation in England and Wales (ss 18-21, Schedules 13-14); and the suspension of the requirement to hold inquests with juries in England, Wales and Northern Ireland, including if a death in custody in Northern Ireland appears to the coroner to have been due to natural causes (ss 30-32).

The possible extension of statutory time limits for the retention of fingerprints and DNA profiles for a maximum of 12 months (s 24); and the provisions on remote court hearings (ss 53-57, Schedules 23-27) might engage Article 6 ECHR on the right to a fair trial. Defendants with learning disabilities and hearing or vision impairments might be disproportionately affected by the provisions for remote court hearings.<sup>401</sup>

Section 51 and Schedule 21 delineate with ellipses instead of specificity the powers of ‘public health officers’, ‘constables’ or ‘immigration officers’ to ‘direct or remove’ a potentially infectious person to ‘a screening and assessment place’. This is not necessarily a power to detain an individual, but Article 5(1)(e) ECHR should be kept in mind.

The Coronavirus Act also provides for the temporary closure of educational institutions and childcare premises (ss 37-38, Schedules 16-17). Elections, referenda, and canvassing scheduled for after 15 March 2020 have been postponed, with those scheduled for May 2020 to be held in May 2021 (ss 59-70). The Secretary of State has powers to issue directions in relation to public gatherings (s 52, Schedule 22 – engaging Article 11 ECHR, and likely to fulfil the criteria in the second paragraph for lawful infringements with the freedom of assembly); and alongside sundry taxation and pension provisions, and provisions for the registration of health and social care workers and volunteers, there is provision to protect business tenants from

<sup>401</sup> Equality and Human Rights Commission, [‘Inclusive Justice: A System Designed for All \(Interim Evidence Report\) Video Hearings and Their Impact on Effective Participation’](#)

forfeiture and residential tenants from eviction by changing statutory notice periods (ss 81-84, Schedule 29).

Apart from the s.19 Human Rights Act statement of compatibility, there are no references to human rights in the text of the Coronavirus Act. Parliamentary debate noted concern on the length of time for which the provisions were to be in force; the broad scope of delegated powers and Parliamentary oversight of the Act.<sup>402</sup> Initially, the Coronavirus Bill was to have remained in force for two years. Following amendments in the House of Commons, there will be six-monthly review by MPs voting if and only if Parliament is sitting. If MPs vote to stop the provisions, ‘the government must make regulations to prevent provisions having effect within 21 days’.<sup>403</sup>

#### **IV. The Health Protection (Coronavirus) Regulations 2020**

The following analysis refers to the Regulations for England only. The Regulations were made on 26 March 2020 by the Secretary of State for Health and Social Care under powers conferred by sections 45C(1), (3)(c), (4)(d), 45F(2) and 45P of the Public Health (Control of Disease) Act 1984: ‘restrictions or requirements... in response to... a threat to public health’ (s 45C(3)(c)). In the preliminary text, the Secretary of State asserts that the restrictions are ‘proportionate to what they seek to achieve, which is a public health response to’ ‘the serious and imminent threat to public health which is posed by the incidence and spread of severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2) in England’. This assertion recalls the second paragraphs of Articles 8-11 ECHR, and suggests some consideration of the lawfulness of the Regulations under the Human Rights Act 1998. Further, the Secretary of State believed ‘by reason of urgency, it is necessary to make this instrument without a draft having been laid before, and approved by a resolution of, each House of Parliament.’ This absence of scrutiny is based on a dubious premise, given that the government had almost three months’ notice of the emergence of novel coronavirus before these Regulations were made. There has been some debate between public lawyers as to the specificity and therefore lawfulness of these restrictions.<sup>404</sup>

The Regulations will be reviewed by the Secretary of State ‘at least once every 21 days’ (Regulation 3(2)). The Regulations provide for the closure of premises and businesses where food and drink are sold on site (Regulation 4 and Schedule 2); and of shops, libraries, holiday accommodation, and places of worship (Regulation 5, with exceptions specified). Regulation 6 provides that during the emergency period, ‘no person may leave and be outside the place where they are living without reasonable excuse’ (as amended 22 April 2020). Regulation 6(2) lists a range of reasonable excuses, including obtaining money, food, medicine, medical care or to donate blood; providing personal care or assistance to ‘vulnerable persons’,<sup>405</sup> to attend

<sup>402</sup> [House of Lords Constitution Committee](#)

<sup>403</sup> Institute for Government, [Explainer, Coronavirus Act](#)

<sup>404</sup> J King, [‘The Lockdown is Lawful’: DA Green, ‘Can we be forced to stay at home?’](#)

<sup>405</sup> The definition of ‘vulnerable persons’ in Schedule 1 of the Regulations includes those over 70 and those with a range of health conditions and disabilities, similar to the list initially advised to stay at home for 12 weeks in

a funeral (if a close family member, or if no family members of the deceased attend, a friend) to pay one's respects at a burial ground or similar; allowing for the children of separated parents to visit the other parent, and 'to avoid injury or illness or escape a risk of harm.' Several of these reasonable excuses might reflect Article 8 ECHR, and the rights in the CRC and CEDAW. The latter was included to protect victims of domestic violence. The first few reasonable excuses recall but do not invoke the right to food, and the right to health. The Parliamentary Joint Committee on Human Rights (JCHR) has noted the conflicts and ambiguity between the legal proscriptions in the Regulations, and the government's and police forces' own guidance and statements. It considers that Article 7 of the ECHR (no punishment without law) might be engaged; and urges careful evaluation of the proportionality of police response under Article 8 ECHR.<sup>406</sup>

Regulation 7 restricts gatherings of more than two people in a public place, with certain exceptions, such as: where the more than two people are from the same household, where the gathering is 'essential for work purposes', to attend a funeral; and 'where reasonably necessary' to 'facilitate a house move', to 'provide care or assistance to a vulnerable person', 'provide emergency assistance', and to 'participate in legal proceedings or fulfil a legal obligation'.

Regulation 8 empowers police officers, police community support officers, persons designated by a local authority in relation to the Regulations, and others so designated by the Secretary of State to 'direct' the dispersal of a gathering, to 'direct' or 'remove' (since 22 April, with 'reasonable force' if necessary) a person from a public place back to the place where they are living; and to give them a 'prohibition notice' if it is 'necessary and proportionate' to do so. There are specific powers in relation to children who are in public. These powers enable remarkable discretion, and have led to police and government statements that food shopping should be once a week, for essential items; and that outside exercise should be only once a day. These restrictions are not in the Regulations for England, although the latter restriction does appear in the Regulations for Wales.<sup>407</sup>

Regulations 9, 10 and 11 provide for specified offences, fixed penalty notices, and prosecution respectively. A fixed penalty notice of £60 may be imposed for a first offence, doubling with each successive offence to a maximum of £960.

Each of these powers, and the discretion exercised in individual cases, requires careful scrutiny on proportionality grounds. The government has not derogated from the ECHR or the ICCPR, despite references to an 'emergency' in the Coronavirus Act and Regulations. While a structured proportionality analysis is a form of human rights scrutiny, the failure to derogate means that domestic courts, the European Court of Human Rights and the UN Human Rights

March 2020, and those advised to receive annual flu vaccination. There is no reference in the Regulations to the rights of 'vulnerable persons'; they are assumed in Reg 6 to be in receipt of care, and to be a potential 'reasonable excuse' for presumptively non-vulnerable persons to leave their homes.

<sup>406</sup> JCHR, Chair's Briefing Paper, 8 April 2020.

<sup>407</sup> *ibid.*

Committee cannot conduct additional scrutiny of the temporal scope and extent of the government's measures.

## **V. Specific Human Rights Concerns**

### **a. Right to Information**

At the most general level, the government's arguable delay in implementing sound public health responses engages the full spectrum of international human rights law. Much domestic legal attention, including that of the JCHR, has focused on the Act and Regulations' infringements of qualified rights under Articles 8-11 ECHR; and the scope for confusion and discretion in the combination of guidance and legislative restrictions. There has been less scrutiny of the effects of government policy and delay on other international human rights commitments. Arguably, failures in February and March 2020 effectively to communicate the science from other countries experiencing Covid-19 to the general public led to misinformation as to the likely death toll and risk profile for individuals with and without 'underlying health conditions'. This engages the right to information component of the freedom of expression, protected by Article 10 ECHR. This misinformation coincided with an increasing emphasis on 'vulnerable persons' and the 'extremely vulnerable' being encouraged respectively to self-isolate and 'shield', leading to differential impacts on elderly people, people with disabilities and chronic health conditions. The right to information is also engaged by the government's testing policy (so the true prevalence of Covid-19 cases is understood) and by the data released daily on death rates. Where the numbers released failed (until 28 April) to include deaths at home, in hospices and care homes, then the right to information is *prima facie* infringed, and without an apparent legitimate aim. Thus far, the government has refused to release information on a pandemic flu simulation from 2016, Operation Cygnus, which allegedly emphasised that NHS critical care capacity and mortuary space would be overwhelmed, and that the UK was insufficiently prepared.

### **b. Economic and Social Rights**

Despite its ratification of the ICESCR, the UK government has not invoked the right to food or the right to health in its statements on the Covid-19 response. This underlines the civil and political rights bias which follows from the domestic incorporation only of the ECHR. Advocacy on economic and social rights has been left to scholars and practitioners, with particular concern noted on the delayed implementation of vouchers to replace free school meals once schools had closed to all but the children of key workers, children with child protection social workers, and some children with Education, Health and Care Plans (EHCP).. A House of Commons Library briefing notes the plight of migrant and asylum-seeking families and others with no recourse to public funds.<sup>408</sup> There have been repeated reports of delays and technical difficulties with the government's voucher scheme to provide food for children in

<sup>408</sup> M Gower and S Kennedy, ['Coronavirus: Calls to Ease No Recourse to Public Funds Conditions'](#) (House of Commons Library 2020) >

receipt of free school meals.<sup>409</sup> There has been little UK-based advocacy on the right to health. There is an urgent question as to whether patients in care homes who are not given hospital treatment for suspected or confirmed Covid-19 are experiencing right to health violations, combined with Articles 2 and 3 ECHR. There is a further question of whether the government's delayed response to the pandemic engages both the right to health and Article 2 ECHR for those people infected with Covid-19 and who died prior to or soon following the lockdown. In contrast, public discourse tends to focus on the harms to the economy of the Covid-19 lockdown, and speculation as to when the lockdown will be lifted to save the economy; not to respect and ensure people's economic and social rights.

### c. Positive Obligations under Article 2 ECHR

Elsewhere I argue that Article 2 ECHR's positive operational obligations to protect life apply during the Covid-19 pandemic, at least in relation to i) the provision of personal protective equipment (PPE) for health and social care workers; and ii) ethics guidance on the rationing of critical care during the pandemic.<sup>410</sup>

#### i. *Provision of personal protective equipment (PPE) for health and social care workers*

In the early weeks of the pandemic, there were concerns that the PPE available, and the national guidance on its use, fell short of World Health Organisation (WHO) guidelines; and prior to the first deaths of health care workers from Covid-19, there were calls from the [Royal College of Nursing](#), the [British Medical Association](#) and the editor of [The Lancet](#) urgently to ensure the supply and distribution of PPE. Since then, more than 100 health and social care workers have died of Covid-19; though it is unknown the extent to which each of these individuals had access to sufficient PPE. A judicial review application has been brought by two NHS doctors, and is pending at this writing, drawing *inter alia* on Article 2 ECHR's positive operational obligations.<sup>411</sup>

Article 2 imposes not merely negative obligations to refrain from taking life, but also (since *Osman v UK*) a range of positive obligations to take steps to prevent the unlawful deprivation of life where the state knows or should have known of the threat to an individual's life. Those

<sup>409</sup> BBC News, '[Coronavirus: Families still Waiting for Free School Meal Vouchers](#)', 30 April 2020

<sup>410</sup> E Stubbins Bates, '[Article 2 ECHR's Positive Obligations—How Can Human Rights Law Inform the Protection of Health Care Personnel and Vulnerable Patients in the COVID-19 Pandemic?](#)' (*Opinio Juris*, 1 April 2020); E Stubbins Bates and C Mallory, 'The Importance of Human Rights Law in the Covid-19 Pandemic' (manuscript under review, April 2020).

<sup>411</sup> See *ibid*, C Mallory, '[The Right to Life and Personal Protective Equipment](#)' (UK Constitutional Law Association, 21 April 2020); P Bowen, '[Learning Lessons the Hard Way – Article 2 Duties to Investigate the Government's Response to the Covid-19 Pandemic](#)' (UK Constitutional Law Association, 29 April 2020) <<https://ukconstitutionallaw.org/2020/04/29/paul-bowen-qc-learning-lessons-the-hard-way-article-2-duties-to-investigate-the-governments-response-to-the-covid-19-pandemic/>>; Garden Court Chambers, 'Legal challenge against UK government's guidance about personal protective equipment in hospitals' 23 April 2020 <https://www.gardencourtchambers.co.uk/news/legal-challenge-against-uk-governments-guidance-about-personal-protective-equipment-in-hospitals>

positive obligations are subject to a margin of appreciation which is limited in relation to resource constraints, but nonetheless, per *Osman*, positive obligations should not be construed as to impose an ‘impossible or disproportionate burden’ on the national authorities. Article 2 positive obligations now apply in any situation where there is a threat to life, whether public or private (*Oneryildiz v Turkey*) and the case law includes natural disasters, the denial of life-saving medical care, and the provision of equipment to armed forces personnel. The case of *Stoyanovi v Bulgaria* establishes that states must first set a framework of laws to protect life, and, if individuals (in that case soldiers) experienced “dangerous” situations of specific threat to life which arise exceptionally from risks posed by violent, unlawful acts of others or man-made or natural hazards’, states must also take preventive operational measures. It is this principle which is most relevant to the provision of PPE for health and social care personnel in the UK. The ECtHR has developed positive investigatory obligations for arguable violations of Articles 2 and 3 ECHR. Bowen argues that these apply where health workers have died arguably as a result of insufficient PPE. He foresees inquests and a public inquiry under the Inquiries Act 2005.<sup>412</sup>

#### *ii. Ethics guidance on the rationing of critical care during the pandemic*

In March 2020, the National Institute for Health and Care Excellence (NICE) produced a hurried [guideline](#) in anticipation that hospital intensive care units (ICU) would be overwhelmed by the number of Covid-19 patients requiring ventilatory support. The NICE guideline was the first of a series of variable documents from professional bodies, but the only attempt at binding national guidance. NICE applied a numerical Clinical Frailty Scale, usually used for patients with dementia, suggesting that those requiring personal care support and mobility (with a frailty score of 5 or more) would be perhaps ineligible for critical care. The NICE guideline was amended following a letter before action from solicitors representing people with autism and learning disabilities, so that the scale is not to be used ‘in younger people, people with stable long-term disabilities (for example, cerebral palsy), learning disabilities or autism’, who should receive an ‘individualised assessment’. ‘[C]omorbidities and underlying health conditions’ should be considered ‘in all cases’ (p.6), which implies the relevance of these characteristics to the rationing of critical care; it is not specified that ‘underlying health conditions’ are considered as part of an individual clinical assessment. ‘Human rights’ are absent from the guideline, although there is a responsibility to ‘have due regard to the need to eliminate unlawful discrimination...’ (p.2).

The BMA was aware of the risk of indirect discrimination from its separate (non-binding) guidance and asserted that such discrimination could be defended on grounds of necessity and proportionality under the Equality Act 2010.<sup>413</sup> Neither document analyses human rights in the context of rationing critical care during the pandemic. Only the Royal College of Nursing’s guidance does so.<sup>414</sup> People with disabilities were not involved in these guidance tools, in breach of Articles 25 and 29 of the CRPD. A judicial review application is pending at this

<sup>412</sup> Bowen, *supra*.

<sup>413</sup> BMA, Covid Frequently Asked Questions, 20 March 2020.

<sup>414</sup> Royal College of Nursing, ‘Clinical Guidance for Managing COVID-19’ >

writing to seek disclosure of national guidelines on the rationing of critical care during the pandemic, amid uncertainty as to a clinical decision tool of unknown provenance but bearing the NHS logo revealed by a Financial Times investigation.<sup>415</sup>

These documents offer guidelines on when to withhold (and in the BMA's case potentially to withdraw) ventilatory support from Covid-19 patients. Their aim is to ration scarce resources, and to provide ethical justifications for doing so. Their aim is not to protect Article 2 rights, despite the utilitarianism in the BMA's reference to saving the greatest possible number of lives, based on a criterion of 'capacity to benefit quickly' from critical care. Liddell and colleagues note that these documents fail to ensure patients' legal rights *inter alia* under Articles 2 and 3 ECHR. Article 3 is engaged by the act of administering anti-sedation drugs before extubating a patient.<sup>416</sup>

I argue elsewhere that Article 2's positive obligations cannot be prospectively disappled. In particular, Article 14 and Article 2 read together provide that they cannot be prospectively disappled in relation to particular groups. Infringements of Article 2 cannot be justified by necessary and proportionality arguments based on a 'legitimate aim' of conserving critical care capacity within the NHS. Instead, ECtHR case law provides that states have a positive obligation to take preventive operational measures where there is a 'systematic or structural dysfunction in hospital services' which might result in patients 'being deprived of access to life-saving emergency treatment'.<sup>417</sup>

To date, it is asserted that the NHS still has spare critical care capacity. The reason for this is unexplained, given the reported findings of Operation Cygnus (the pandemic flu simulation) in 2016 that the NHS would be quickly overwhelmed, with insufficient ventilators available. Simultaneously, we do not know the true figures of those infected and deceased in care homes and at home. Following the NICE rapid guideline, there were individual cases of GP surgeries writing to elderly patients and those with underlying health conditions, including learning disabilities, either to request or inform them of the imposition of Do Not Attempt Cardiopulmonary Resuscitation (DNACPR) orders. In the case of one GP surgery in Wales, the letter sent to patients invoked the risk to paramedics who might become infected with Covid-19 if they performed CPR on a person to whom the letter was addressed.<sup>418</sup> Apologies were issued in these individual cases, and the Care Quality Commission among others firmly stated that blanket policies in relation to DNACPR were unacceptable.<sup>419</sup> The prevalence of this practice, and whether it is subject to separate, additional government instruction or

<sup>415</sup> B Staton and others, '[NHS "Score" Tool to Decide Which Patients Receive Critical Care](#)' *Financial Times* (12 April 2020).

<sup>416</sup> K Liddell and others, '[Who Gets the Ventilator? Important Legal Rights](#)' [2020] *Journal of Medical Ethics* —, '[Deciding Who Gets the Ventilator: Will Some Lives Be Lost Unlawfully?](#)' (*Journal of Medical Ethics* blog, 12 April 2020).

<sup>417</sup> E Stubbins Bates, *supra*, citing the second exception in *Lopes de Sousa Fernandes v Portugal, and Askiye Genc v Turkey*

<sup>418</sup> For links to coverage of these incidents, see S Hosali, '[The Fight against Covid-19: Whose Life Counts?](#)' (British Institute of Human Rights, 2 April 2020)

<sup>419</sup> R Booth, '[UK Healthcare Regulator Brands Resuscitation Strategy Unacceptable](#)' *The Guardian* (1 April 2020)

guidance, is still unknown. These actions engage Article 2 ECHR, potentially read together with Article 14.

## VI. Summary Evaluation

Best Practices
<ul style="list-style-type: none"><li>• Houses of Parliament continue debate, Parliamentary Question Time and select committees continue using public internet provision</li><li>• The Secretary of State reviews the Health Protection (Coronavirus) Regulations 2020 every three weeks</li><li>• Court hearings are ongoing, with virtual hearings for some civil cases although jury trials in the Crown Court have been suspended</li></ul>
Concerns
<ul style="list-style-type: none"><li>• Only six-monthly Parliamentary scrutiny of the powers in the Coronavirus Act 2020</li><li>• Delayed action in relation to coronavirus, and consequent avoidable loss of life potentially infringing Art. 2 ECHR</li><li>• Right to information concerns:<ul style="list-style-type: none"><li>○ true death toll</li><li>○ pandemic planning</li><li>○ government refusal to disclose the results of Operation Cygnus, which evaluated the UK's pandemic readiness</li></ul></li><li>• Arguable misinformation as to the risk profile of all sections of the population in February and March 2020, given the government's extensive rhetoric about older adults and those with 'underlying health conditions' being the (only) 'vulnerable' groups</li><li>• Failure to derogate from the European Convention on Human Rights (ECHR) and the International Covenant on Civil and Political Rights (ICCPR), despite the Health Protection (Coronavirus) Regulations, which refer to an 'emergency period'</li><li>• Failures to protect the right to life of health and social care personnel with the storage and provision of personal protective equipment (PPE)</li><li>• Rapidly changing official guidance on PPE which was tailored to supply and not scientific advice</li><li>• The co-existence of non-binding advice and legislation/Regulations, leading to the discretionary over-interpretation of the legislation by some police officers</li><li>• Alleged failures to respect and ensure the Article 2 ECHR rights of individuals in care homes and places of detention;</li><li>• Disability rights:<ul style="list-style-type: none"><li>○ Undisclosed and variable guidance on the rationing of critical care which suggests that older adults and those with significant 'frailty' would be denied critical care</li><li>○ Discriminatory practice by some general practitioners in imposing Do Not Attempt Cardiopulmonary Resuscitation orders on people with disabilities, including learning disabilities, and those in care homes.</li></ul></li></ul>

- Recurrent rhetoric on ‘vulnerable groups’ and ‘shielding’, which fails to acknowledge disabled and older adults’ rights to life and health, and which assumes they are recipients of services rather than individuals with full spectrum human rights.
- Concerns about the right to food, including for the children of people with no recourse to public funds.

# ZIMBABWE

*Sanya Samtani*

## I. Covid-19 background

As of 22 April 2020, Zimbabwe had tested 4159 people, reporting 29 positive cases of COVID-19 and 4 deaths due to COVID-19.<sup>420</sup> Zimbabwe's first coronavirus death was the 30-year old son of a prominent business mogul and member of the ruling party, but nevertheless was not provided with respiratory support.<sup>421</sup>

Zimbabwe's government declared a state of national disaster on 17 March 2020.<sup>422</sup> Parliament was suspended as of 18 March 2020 until 05 May 2020.<sup>423</sup> The President then declared a nationwide lockdown from the 30 March 2020 for a period of 21 days. The lockdown consisted of a stay-home order (subject to limited exceptions), banning large gatherings, closure of all but essential services, suspension of public transport, deployment of national command security for enforcement of the lockdown and an exemption for funerals (up to 50 people).<sup>424</sup> On 19 April 2020, the lockdown was extended for a further 21 days until 03 May 2020.<sup>425</sup>

## II. Constitutional and human rights framework

Zimbabwe is party to the two human rights covenants – the ICCPR and ICESCR. In relation to the other human rights treaties, Zimbabwe is party to the Convention on the Elimination of All Forms of Discrimination against Women, International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Rights of the Child, Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, and the Convention on the Rights of Persons with Disabilities. The only individual treaty body complaints procedure that Zimbabwe has acceded to is the Optional Protocol to the Convention on the Rights of Persons with Disabilities.<sup>426</sup>

<sup>420</sup> Zimbabwe, [Coronavirus Worldometer, Testing statistics available from Ministry of Health and Child Care.](#)

<sup>421</sup> 'Few Doctors, Fewer Ventilators: African Countries Fear They Are Defenseless Against Inevitable Spread of Coronavirus', TIME (07 April 2020).

<sup>422</sup> 'Zimbabwe Declares National Disaster in Response to Coronavirus Pandemic', VOA (17 March 2020)

<sup>423</sup> National Assembly Hansard, 18 March 2020, Vol. 46, No. 36

<sup>424</sup> Zimbabwe Declares 21-Day National Lockdown Over Coronavirus, Army To Be Deployed, IHarare (27 March 2020), available at: <https://iharare.com/watch-zimbabwe-declares-21-day-national-lockdown-over-coronavirus/> (accessed on 13 April).

<sup>425</sup> Zimbabwe lockdown extended for two weeks, TimesLIVE (19 April 2020) available at: <https://www.timeslive.co.za/news/africa/2020-04-19-zimbabwe-lockdown-extended-for-two-weeks/> (accessed on 21 April).

<sup>426</sup> Office of the High Commissioner for Human Rights [Ratification status of Zimbabwe](#)

In terms of regional human rights obligations, Zimbabwe is party to the African Charter on Human and Peoples' Rights<sup>427</sup> and is a member of the Southern African Development Community.<sup>428</sup>

This creates a network of interlocking international obligations that Zimbabwe has undertaken on the international plane, denoting its commitment to human rights and the rule of law. The Constitution of Zimbabwe provides for a dualist system with the explicit incorporation of treaties within the domestic law of the state through an Act of Parliament. On the basis of these constitutional provisions, Zimbabwe's binding international obligations may be incorporated into domestic law.<sup>429</sup>

Zimbabwe's 2013 Constitution provides for the following structure of government: the executive branch, comprising of the President and the Cabinet (comprising of the President, Vice President, Ministers and Deputy Ministers); the legislative branch, comprising of the Senate (Upper House of Parliament) and the National Assembly (Lower House of Parliament) and the judicial branch, comprising of the Supreme Court, the highest court of appeal (which also sits as a Constitutional Court for constitutional matters), the High Courts (based in the country's four largest cities) as well as Labour Courts, the Administrative Court and Magistrate's Courts.<sup>430</sup>

The Constitution also protects certain fundamental rights and freedoms in Chapter 4, titled "Declaration of Rights". The rights most relevant to the Covid-19 response are: the right to life,<sup>431</sup> personal liberty,<sup>432</sup> human dignity,<sup>433</sup> personal security,<sup>434</sup> privacy,<sup>435</sup> education,<sup>436</sup> healthcare,<sup>437</sup> food and water.<sup>438</sup> Additionally, the Constitution also safeguards political rights,<sup>439</sup> environmental rights,<sup>440</sup> freedom of assembly and association,<sup>441</sup> conscience,<sup>442</sup> demonstrate,<sup>443</sup> expression and media,<sup>444</sup> profession, trade or occupation,<sup>445</sup> movement and residence;<sup>446</sup> freedom from arbitrary evictions,<sup>447</sup> the right to equality and non-

<sup>427</sup> [States parties to the African Charter](#).

<sup>428</sup> Southern African Development Community, [Zimbabwe](#).

<sup>429</sup> Section 327, [Constitution of Zimbabwe](#), 2013.

<sup>430</sup> Ibid.

<sup>431</sup> Section 48, Constitution.

<sup>432</sup> Section 49, Constitution.

<sup>433</sup> Section 51, Constitution.

<sup>434</sup> Section 52, Constitution.

<sup>435</sup> Section 57, Constitution.

<sup>436</sup> Section 75, Constitution.

<sup>437</sup> Section 76, Constitution.

<sup>438</sup> Section 77, Constitution.

<sup>439</sup> Section 67, Constitution.

<sup>440</sup> Section 73, Constitution.

<sup>441</sup> Section 58, Constitution.

<sup>442</sup> Section 60, Constitution.

<sup>443</sup> Section 59, Constitution.

<sup>444</sup> Section 61, Constitution.

<sup>445</sup> Section 64, Constitution.

<sup>446</sup> Section 66, Constitution.

<sup>447</sup> Section 74, Constitution.

discrimination;<sup>448</sup> the right of access to information.<sup>449</sup> The Constitution protects access to justice and ensures accountability for rights violations through protecting the right to administrative justice,<sup>450</sup> a fair hearing<sup>451</sup> and enumerates the rights of an accused person<sup>452</sup> as well as the rights of arrested and detained persons.<sup>453</sup>

These rights may be limited only where a law of general application permits it and subject to it being necessary and reasonable in a democratic society.<sup>454</sup> However, during emergencies, these rights may be limited through a written law to the extent to which the emergency strictly requires it.<sup>455</sup>

The government has not invoked a state of emergency under the Constitution,<sup>456</sup> instead declaring a national disaster. The legal basis for the measures taken is below.

### **III. Legal Basis for Measures**

There are four main legal bases for the measures adopted in response to Covid-19. First, the Civil Protection Act, 1989 (“CPA”); second, the Public Health Act, 2018 (“PHA”); third, regulations made under both statutes, and fourth, Public Health (Covid-19 Prevention, Containment and Treatment) (National Lockdown) Order, 2020 ('Lockdown Order'), gazetted in terms of the regulations. As of 19 April 2020, the lockdown was extended to 03 May 2020 through an amendment to the Lockdown Order.<sup>457</sup>

The President’s initial declaration of the state of national disaster was made under s 27 of the Civil Protection Act.<sup>458</sup> The declaration automatically expires 3 months from the date of issue unless revoked or extended by the President within the 3 month period.<sup>459</sup> This declaration mobilises the funds within the National Civil Protection Fund in responding to the disaster for the purpose of research and training, acquisition of materials and equipment, building of infrastructure amongst other purposes which are determined by the Minister authorised by the President.<sup>460</sup> The President is empowered to authorise unforeseen expenditure pursuant to the state of disaster.<sup>461</sup> The Act also empowers the authorised Minister to promulgate regulations to ensure that the Act is given effect to, subject to the proviso that penalties prescribed for the

<sup>448</sup> Section 56, Constitution.

<sup>449</sup> Section 62, Constitution.

<sup>450</sup> Section 68, Constitution.

<sup>451</sup> Section 69, Constitution.

<sup>452</sup> Section 70, Constitution.

<sup>453</sup> Section 50, Constitution.

<sup>454</sup> Part 5, Constitution.

<sup>455</sup> Section 87, Constitution.

<sup>456</sup> Second Schedule, Constitution.

<sup>457</sup> (Public Health (COVID-19 Prevention, Containment and Treatment) (National Lockdown) (Amendment) Order, 2020 (No. 3)).

<sup>458</sup> Leading to the enactment of [SI 2020-076](#) Civil Protection (Declaration of State of Disaster Rural and Urban Areas of Zimbabwe) (COVID-19) Notice, 2020.

<sup>459</sup> Section 27, CPA.

<sup>460</sup> Section 29-32, CPA.

<sup>461</sup> Section 34, CPA

violation of the regulations shall not exceed a fine of level 5 or imprisonment of a period of up to 6 months.<sup>462</sup>

The regulations specific to Covid-19 were promulgated in terms of the Public Health Act, 2018.<sup>463</sup> Covid-19 was statutorily declared to be a ‘formidable epidemic disease’, under s 64 of the Public Health Act, until 20 May 2020.<sup>464</sup> The Act also places a positive obligation upon the local authority to ensure (provide and maintain) water supply,<sup>465</sup> failing which the penalty imposed is a fine not greater than level 14.

The Minister of Health and Child Care is empowered by the Public Health Act to promulgate regulations. The Minister has promulgated the Public Health (COVID-19 Prevention, Containment and Treatment) Regulations, 2020, which provide for the following measures:

- Quarantine and restriction of public movement
- Closure of schools, places of public entertainment, places of worship
- Prevention of overcrowding and inspection, evacuation or demolition of premises if necessary
- Medical examination and disinfection as well as surveillance of persons infected or suspected to be infected
- Establishment of isolation hospitals and their management.

The penalty for contravention of the regulations made pursuant to this section is a fine less than level 12 (ZW\$ 36,000) and imprisonment for a period of up to 12 months.<sup>466</sup> The Public Health Regulations 2020 additionally provide for arrest without warrant of persons breaching enforced quarantine.<sup>467</sup> On 28 March 2020, the regulations were amended to include members of the Defence Forces of Zimbabwe among those authorised as enforcement officers. Additionally, the restriction on gatherings was further reduced to prohibit not more than 2 people congregating.<sup>468</sup>

The Public Health (Covid-19 Prevention, Containment and Treatment) (National Lockdown) Order, 2020 was gazetted pursuant to s 8(1) of the Public Health (COVID-19 Prevention, Containment and Treatment) Regulations, 2020 by the Minister of Health. The Lockdown Order extends from 30 March 2020 to 19 April 2020.<sup>469</sup> Criminal penalties for violating all restrictions within this order are a fine up to level 12 and or imprisonment for up to 12 months.<sup>470</sup> It includes a stay-home order, which provides exceptions only for access to supermarkets, gas stations, medicines, obtainment of medical assistance and essential services

<sup>462</sup> Section 44, CPA.

<sup>463</sup> SI 2020-077 Public Health (COVID-19 Prevention, Containment and Treatment) Regulations, 2020.

<sup>464</sup> Section 3, SI 2020-077 Public Health (COVID-19 Prevention, Containment and Treatment) Regulations, 2020

<sup>465</sup> Section 86-90, PHA.

<sup>466</sup> Section 68(2), PHA. Reflected in the Public Health Regulations 2020.

<sup>467</sup> Section 7(2), Public Health Regulations 2020.

<sup>468</sup> Public Health (COVID-19 Prevention, Containment and Treatment) (Amendment) Regulations, 2020 (No. 1)

<sup>469</sup> Section 4, Lockdown order.

<sup>470</sup> Section 4(4), 5(3), 11 Lockdown order.

within a 5km radius around the person's residence.<sup>471</sup> There is an exception for where these services may not be obtained within a 5km radius. Additionally, these Regulations require closure of all restaurants (other than those providing takeaway or within hotels) and other business establishments other than essential services (illustrated in the order), schools, intercity transport (except for Zimbabwe United Passenger Company, a parastatal company and police and defence transport, buses for essential services and medical assistance).<sup>472</sup> The Presidential Spokesperson clarified that coal mining and manufacturing for 'essential services' would continue during the lockdown whilst other mining companies were to apply for exemptions in order to be permitted to continue.<sup>473</sup>

The burden of proof is reversed for persons apprehended by enforcement officers to demonstrate lawful reasons for being outside their homes.<sup>474</sup> Enforcement officers may notify persons in breach of the above measures to return home directly and that court summons will be issued – if met with refusal, the enforcement officer may arrest such person without warrant.<sup>475</sup> The Lockdown Order also orders closure of all airports (except for the International Airports in Harare, Bulawayo and Victoria Falls), and in relation to other ports of entry it allows the Minister of Home Affairs to order border closure if deemed necessary.<sup>476</sup>

Additionally, for the same period of time, the Lockdown Order prohibits gatherings of more than two individuals in any public place – except in the case of waiting for permitted public transport and funeral services, where a gathering of 50 people is permitted as long as they follow social distancing.<sup>477</sup>

The Lockdown Order also prohibits hoarding of medical supplies and food "in excess of what is needed". The breach of this provision attracts the same criminal penalties as breaches of the other provisions.<sup>478</sup> If an enforcement officer has a reasonable suspicion of breach, upon obtaining a judicial warrant, search and seizure of hoarded materials is permitted.<sup>479</sup> Additionally, the raising of prices of goods or services (including rents) in order to "profiteer" from the situation is also criminalised.

The final provision of the Lockdown Order criminalises the publication and reporting of false information about any officer (public officer, official or enforcement officer) or private persons that prejudices the enforcement of the lockdown. The criminal penalty is derived from s 31 of the Criminal Law Code which is a fine up to or exceeding level 14 or imprisonment for a period of up to 20 years or both.<sup>480</sup>

<sup>471</sup> Section 4(1), Lockdown order.

<sup>472</sup> Section 4(2), Lockdown order.

<sup>473</sup> '[COVID-19 Zimbabwe's Exemptions to the Lockdown](#)' (Bulawayo24, 30 March 2020).

<sup>474</sup> Section 4(3), Lockdown order.

<sup>475</sup> Section 4(5), Lockdown order.

<sup>476</sup> Section 8(1), Lockdown order.

<sup>477</sup> Section 5(1), Lockdown order.

<sup>478</sup> Section 12(3), Lockdown order.

<sup>479</sup> Section 12(4), Lockdown order.

<sup>480</sup> Section 14, Lockdown order.

On 08 April 2020, the Ministry of Women Affairs, Community, Small and Medium Enterprises Development announced that it would provide support to small and medium enterprises but the details of this plan, eligibility criteria, quantum of support, type of assistance, and procedures to apply for this assistance have not been made available.<sup>481</sup>

On 19 April 2020, the Minister for Health and Child Care promulgated regulations on the standards to be met for the manufacture and sale of PPE.<sup>482</sup> The sale or manufacture of PPE in violation of these standards is criminalised in line with the penalties provided for in the Lockdown Order.

Additionally, the lockdown was further extended till 05 May 2020. An amendment to the Lockdown Order as of 21 April 2020 introduced a set of new regulations titled “Phased Relaxation of National Lockdown”. These regulations explicitly exempt the mining, manufacturing and tobacco auctioning sectors from the lockdown.<sup>483</sup>

#### **IV. Review of Measures Adopted: Alarm Bells and Best Practices**

In order to assess the human rights implications of these measures, a contextual approach is necessary. It is beyond the scope of this report to provide a comprehensive review of the social, political and economic conditions prevailing in Zimbabwe, but the following features are significant to contextualising the government’s response:

- The economy faces severe challenges of spiralling inflation,<sup>484</sup> cash shortages<sup>485</sup> and public debt.<sup>486</sup> There are allegations of widespread government corruption leading to a trust deficit in the present government.<sup>487</sup>
- Zimbabwe has high levels of unemployment and poverty,<sup>488</sup> with large sections of the population dependent on informal trade (in urban areas) and subsistence agriculture (in rural areas). The IMF in its recent review of Zimbabwe, published on 26 February 2020, concluded that Zimbabwe is in the middle of “an economic and humanitarian crisis” and that Covid-19 is likely to make this crisis even more difficult to respond to.<sup>489</sup> Moreover, a recent malaria outbreak has led to an additional load on the health care system.<sup>490</sup>

<sup>481</sup> Notice, Ministry of Women Affairs, Community, Small and Medium Enterprises Development.

<sup>482</sup> Public Health (Standards for Personal Protective Apparel, Materials and Equipment) Regulations, 2020.

<sup>483</sup> Public Health (COVID-19 Prevention, Containment and Treatment) (National Lockdown) (Amendment) Order, 2020 (No. 4).

<sup>484</sup> [‘IMF: Zimbabwe has the highest inflation rate in the world’](#), Al Jazeera (27 September 2019).

<sup>485</sup> [‘Zimbabwe’s central bank has shut down the use of mobile money for cash transactions’](#), (Quartz, 30 September 2019); See also, [‘A cash crunch heaps even more pain on Zimbabweans’](#), (Al Jazeera, 12 August 2019)

<sup>486</sup> [‘Zim in debt distress’](#) (Zimbabwe Independent, 8 November 2019).

<sup>487</sup> [‘We were promised change – but corruption and brutality still rule in Zimbabwe’](#), (The Guardian, 19 August 2019) See also, for the implications of this for Covid-19: [‘Transparency And Accountability In The Covid-19 Crisis Management And Aid Distribution’](#), (Kubatana, 27 March 2020).

<sup>488</sup> [‘Zimbabwe Country Report’](#), World Bank, 2020.

<sup>489</sup> [‘IMF Executive Board Concludes 2020 Article IV Consultation with Zimbabwe’](#) (IMF, 26 February 2020).

<sup>490</sup> [‘Zimbabwe faces malaria outbreak as it locks down to counter coronavirus’](#) (The Guardian, 21 April 2020).

- There are high levels of food insecurity that preceded the Covid-19 pandemic. In late 2019, the UN Special Rapporteur raised serious concerns about the situation, reporting that 60% of the country's population of 14 million is food-insecure.<sup>491</sup>
- Over 2 million people in the capital Harare alone have no access to clean water for drinking, washing and hygiene despite a constitutional provision guaranteeing “safe, clean and potable water”.<sup>492</sup> The WHO has affirmed the necessity and urgency of sanitation and clean water to combat the Covid-19 crisis.<sup>493</sup>
- UNAIDS estimates that approximately 1.3 million adults and children (just under 10% of the population) were living with HIV in Zimbabwe in 2018.<sup>494</sup> Since populations with “weakened immune systems” are in the high-risk category of contracting severe cases of Covid-19, this statistic is particularly concerning.<sup>495</sup>
- The country is an unstable democracy, with partisan public media<sup>496</sup> and national elections over the past two decades characterised by political violence (directed mainly at the opposition),<sup>497</sup> and allegations of election rigging.<sup>498</sup> In late 2017, former President Robert Mugabe was removed by a military coup that installed the current President, Emmerson Mnangagwa.<sup>499</sup> Since then, there have been incidents involving shooting of protestors by the military, notably in August 2018 (during vote counting in the national elections)<sup>500</sup> and in January 2019 (in response to rising fuel and food costs).<sup>501</sup> Despite the (heavily criticised)<sup>502</sup> Motlanthe Commission of Inquiry recommending that the soldiers who shot protestors in August 2018 be prosecuted,<sup>503</sup> no one has been prosecuted for these shootings till date.
- Opposition politicians and civil society activists are routinely subjected to criminal prosecution, often for the offence of treason or equivalent charges, for voicing opposition to the government.<sup>504</sup>

<sup>491</sup> ‘Once the breadbasket of Africa, Zimbabwe now on brink of man-made starvation, UN rights expert warns’, (Office of the High Commissioner of Human Rights,28 November 2019)

<sup>492</sup> Section 77(a), Constitution of Zimbabwe.

<sup>493</sup> ‘Unsafe Water Raises COVID-19 Risks’ (Human Rights Watch,15 April 2020)

<sup>494</sup> Zimbabwe Overview, UNAIDS

<sup>495</sup> Q&A on COVID-19, HIV and antiretrovirals, (World Health Organisation,24 March 2020)

<sup>496</sup> Simon Matingwina (2019) ‘Partisan Media in a Politically Charged Zimbabwe: Public and Private Media Framing of 2018 Elections’, *African Journalism Studies*, 40:2, 51-66.

<sup>497</sup> ‘Zimbabwe opposition face wave of detentions, beatings after election loss’ (The Guardian,5 August 2018). See also, ‘Zimbabwe opposition party complains of unprecedented persecution as state cracks down’ (The Telegraph,2 December 2019)

<sup>498</sup> ‘Zimbabwe election: tensions rise amid vote rigging fears’ (The Guardian,31 July 2018). See for a detailed analysis of the timeline of events and their legality: Jason Brickhill, ‘Coup, Constitution and the Court: Zimbabwean Constitutional Court whitewashes flawed rigged elections’, OxHRH Blog (24 August 2018).

<sup>499</sup> ‘Zimbabwe's strange crisis is a very modern kind of coup’ (The Guardian,21 November 2017) . See also Blessing-Miles Tendi, ‘The motivations and dynamics of Zimbabwe’s 2017 military coup’, *African Affairs*, Volume 119, Issue 474, January 2020, Pages 39–67.

<sup>500</sup> ‘Zimbabwe election unrest turns deadly as army opens fire on protesters’ (The Guardian,1 August 2018).

<sup>501</sup> ‘Zimbabwe protests after petrol and diesel price hike’ (BBC,14 January 2019).

<sup>502</sup> ‘The Motlanthe Commission’s anniversary of shame’ (ReliefWeb,12 August 2019)

<sup>503</sup> ‘Report Of The Commission Of Inquiry Into The 1 August 2018 Post-Election Violence’(Kubatana,18 December 2018)

<sup>504</sup> ‘Zimbabwe: 7 Detained After Rights Meeting’ (Human Rights Watch,30 May 2019) See also ‘Treason trials raise fears of relapse to Mugabe years’ (The Standard,09 June 2019) and most recently, ‘Zimbabwe court clears opposition official of subversion’(BusinessLive,14 February 2020)

- However, there is an active civil society that is working to respond to some of the human rights concerns that have arisen, including through litigation and advocacy campaigns.<sup>505</sup>

In the context of these conditions in Zimbabwe, the national lockdown exacerbates existing socio-economic inequalities and authoritarian tendencies, leading to further human rights violations and deepens the already existing democratic deficit.

#### **a. Alarm bells (Rights-based)**

##### *i. Weakened health system and lack of sufficient PPE and ventilators*

This is a violation of Zimbabwe's right to healthcare provided for in section 76 of the Constitution. There are serious concerns that Zimbabwe does not have personal protective equipment (PPE) for its health care workers. This prompted a strike, as doctors and nurses withdrew their services until PPE was promised, and later litigation to compel government to provide PPE. This latest challenge arises in the context of a general collapse of the public health system that saw doctors striking over poor conditions amidst a lack of basic medical supplies.<sup>506</sup> There is also a dire shortage of ventilators in Zimbabwe,<sup>507</sup> although some private sector donations have started to supplement the state supply.<sup>508</sup>

##### *ii. Abuse of power by security forces*

In general, the imposition of a lockdown raises concerns that security forces will violate human rights in the course of imposing the various regulations.<sup>509</sup> In the context of previous incidents of assault, rape and killings by security services, this is a real concern.<sup>510</sup> On 12 April 2020, an urgent application was filed at a High Court for an interdict to prevent arbitrary arrests and assaults by the enforcement officers (the police and defence forces).<sup>511</sup> Additionally, there have been reported instances of police brutality against journalists and photographers documenting the lockdown.<sup>512</sup> This implicates the right to personal security, dignity, personal liberty, and in the case of journalists freedom of expression and media as provided for in Zimbabwe's Constitution.

<sup>505</sup> For instance, the civil society organisation [Zimbabwe Lawyers for Human Rights](#) which employs public interest litigation as a tactic to secure human rights within this climate.

<sup>506</sup> '[Doctors sue Zimbabwe government over lack of Covid-19 protective equipment](#)' (The Guardian,9 April 2020).

<sup>507</sup> '[Dire shortage' of equipment to fight coronavirus in Zimbabwe](#)' (Al Jazeera,7 April 2020).

<sup>508</sup> '[Strive Masiyiwa donates ventilators in Covid-19 response](#)', Newsday.

<sup>509</sup> '[Zimbabwean Sues Government to End Lockdown Over Alleged Abuse](#)' (VOA,10 April 2020).

<sup>510</sup> '[Anxiety over rights violations as Zimbabwe enforces lockdown](#)' (Al Jazeera,6 April 2020); [Lockdown Day 14 update](#) (12 April 2020); Amnesty International '[Zimbabwe: Security forces must be held accountable for the brutal assault on human rights](#)' 25 January 2019 Human Rights Watch, '[Zimbabwe: Excessive Force Used Against Protesters](#)' (12 March 2019)

<sup>511</sup> '[Citizens, Zlhr Demand Police, Soldiers Wear Protective Clothing And Stop Brutality During Enforcement Of National Lockdown](#)' (Kubatana,12 April 2020).

<sup>512</sup> '[The Perils of Reporting on the Pandemic](#)' (Daily Maverick,21 April 2020).

*iii. Food insecurity*

The Lockdown Order, prohibiting hoarding of food “in excess of what is needed” at homes, is vague and leaves wide room for excessive use of force by government officials.<sup>513</sup> Given the massive food shortages and insecurity in the country, any regulation that invites policing of what food people are able to store at their homes raises a risk of heightening food insecurity.<sup>514</sup> This implicates the right to food and water, provided for in section 77 of the Constitution.

*iv. Unconstitutionality of provisions of Lockdown Order and inconsistency with rule of law*

The Lockdown Order, criminalising the publication of false information is problematic given the history of abuse of similar laws to prosecute anyone critical of the government, and is of particular concern given the disproportionate sentence of 20 years imprisonment that may be imposed. Moreover, to the extent that this provision criminalises the publication of false information regarding enforcement officers, it is unconstitutional in light of a decision on a similar provision by Zimbabwe’s Constitutional Court in 2014.<sup>515</sup>

*v. Proportionality of criminal penalty*

A further concern about the provision criminalising the publication of false information is the proportionality of the criminal penalty – whilst all other offences detailed in the Lockdown Order and Regulations carry the same penalty (of imprisonment of up to 2 years and or fine of up to ZW \$36,000 – this particular provision consists of a much higher penalty.

*vi. Threat to socio-economic rights*

The regulation that empowers the government to demolish houses and take measures to prevent overcrowding (including evacuation) has a particular impact on Zimbabweans’ access to housing as a large portion of the population lives in informal settlements. Moreover, provision for the government to compensate for such demolition makes the housing situation even more precarious.<sup>516</sup> Demolitions pursuant to this provision have begun but regulations have not been promulgated to explain the compensation mechanism and provision of alternative housing.<sup>517</sup> This implicates the right not to be subjected to arbitrary evictions in section 74 of the Constitution.

<sup>513</sup> ‘[Coronavirus lockdown regulations likely unconstitutional, say lawyers](#)’, Team Zimbabwe.

<sup>514</sup> ‘[Lockdown laws draconian, excessive](#)’ (Zimbabwe Independent,3 April 2020).

<sup>515</sup> *Chimakure & Others v Attorney-General* CCZ 06-14.

<sup>516</sup> ‘[Impact Of SI 77 / 2020 On Access To Secure Housing](#)’ (Kubatana,13 April 2020).

<sup>517</sup> ‘[Demolitions: Who is Responsible](#)’ (Kubatana,22 April 2020).

**b. Alarm bells (Accountability-based):**

*i. Executive-driven response*

Overall, Zimbabwe's response to the Covid-19 crisis has been formulated and implemented by the executive. The PHA and CPA provide for a statutory basis for this executive action. But apart from the sunset provisions as outlined below and the court challenges, there are no other accountability mechanisms to check executive action.

*ii. Suspension of Parliament*

As of March 18 2020, Parliament was suspended until 05 May 2020 due to Covid-19. There has so far been no attempt to reconvene Parliament in order to provide legislative oversight during the Covid-19 crisis. In this light, the response of the Zimbabwean government continues to remain executive-driven with courts as the only check on executive action.

*iii. Corruption*

As mentioned earlier, corruption and the democratic deficit is a pre-existing problem in Zimbabwe.<sup>518</sup> The Zimbabwe Anti Corruption Commission issued a statement on 31 March 2020 alerting all the relevant ministries to put in place transparency mechanisms to ensure the proper distribution of donations that they had received from within and outside the country.<sup>519</sup>

*iv. General failure to implement legal guarantees consistently*

Constitutional guarantees (such as the right to health, food and water) have not been implemented consistently before and during Covid-19.

**c. Best practices:**

*i. Sunset provisions*

The declaration of a national disaster under the CPA expires within three months of its pronouncement (as described above), after which it must be renewed by the President. Further, the initial Lockdown Order, gazetted pursuant to the PHA, explicitly included within it that it would expire on 19 April 2020. This mandates a review and statutorily limits executive action, preventing an indefinite promulgation.

<sup>518</sup> For more information on corruption in Zimbabwe see Transparency International's 2019 [Report on Corruption Perceptions Index](#).

<sup>519</sup> ZACC [Chairperson Statement on Covid-19](#).

### *ii. Access to justice through courts*

Zimbabwe's constitution provides for an independent judiciary with powers of review over executive and legislative actions. During the Covid-19 crisis, Zimbabwe's court system has continued to operate to hear urgent applications related to Covid-19 and the governmental response thereto, with additional safeguards issued by the Office of the Chief Justice.<sup>520</sup> Zimbabwe's civil society has taken to the courts to challenge some of the rights violations outlined above - Zimbabwe Association of Doctors for Human Rights represented by Zimbabwe Lawyers for Human Rights (ZLHR) successfully challenged the government's lack of PPE provision for health care workers in the High Court;<sup>521</sup> ZLHR successfully challenged an abuse of police power on behalf of a survivor, at the High Court;<sup>522</sup> ZLHR successfully challenged the arrest of a journalist.<sup>523</sup> In pending cases, ZLHR filed urgent applications at the High Court for the mandatory provision of clean water to residents of three cities by the local councils, municipalities and central government.<sup>524</sup> There was also a petition by a private person to stop the building of a Covid-19 medical isolation facility in a residential area which was dismissed by the High Court.<sup>525</sup>

## **V. Summary Evaluation**

<b>Best Practices</b>
<ul style="list-style-type: none"><li>• Sunset clauses within executive regulations, subjecting them to re-promulgation upon expiry</li><li>• Functioning and reasonably independent court system as the only accountability mechanism available to the public (with the caveat that concerns have been expressed in the past regarding the independence of Zimbabwe's judiciary especially in the context of challenges to elections)</li></ul>
<b>Concerns</b>
<ul style="list-style-type: none"><li>• Pre-existing economic and humanitarian crises, democratic deficit, partisan media, corruption, high levels of unemployment and poverty, dependence on informal trade, police abuse of power (around elections particularly) and routine criminal prosecutions create an unstable environment for the government to respond to Covid-19</li><li>• Executive-minded response, with courts as the sole accountability mechanism</li><li>• Suspension of Parliament until 05 May 2020 leading to lack of legislative oversight</li><li>• Weakened public health system with lack of sufficient PPE as well as medical equipment.</li></ul>

<sup>520</sup> '[Covid-19 Protection Measures in All Courts in Zimbabwe](#)' (Veritas, 23 March 2020).

<sup>521</sup> Zimbabwe Lawyers for Human Rights, '[Fighting Coronavirus; High Court Orders Govt to Protect Frontline Health Practitioners and Equip Public Hospitals With Medication to Stem Epidemic](#)' (14 April 2020)

<sup>522</sup> Zimbabwe Lawyers for Human Rights '[ZIM Court Censures Soldiers and Police Conduct During #Covid National Lockdown Violations](#)', (14 April 2020).

<sup>523</sup> Zimbabwe Lawyers for Human Rights, '[Zim Court Sets Free Journalist Charged for Contravening #Covid Stringent National Lockdown Regulations](#)', (3 April 2020).

<sup>524</sup> Zimbabwe Lawyers for Human Rights, '[Zim Courts Seized With Petitions for Restoration of Water Supplies to Residents During #Covid National Lockdown](#)', (6 April 2020).

<sup>525</sup> [Stringer v Minister of Health & Sakunda Holdings](#) (HH 259-20).

- Abuse of power by security forces in implementing the Lockdown Order
- Lockdown Order provision regarding publication of misinformation is overbroad and lends itself to arbitrariness
- Lockdown Order imposes disproportionate criminal penalties.
- Threats to socio economic rights such as food, water, housing emerging from the Lockdown Order.